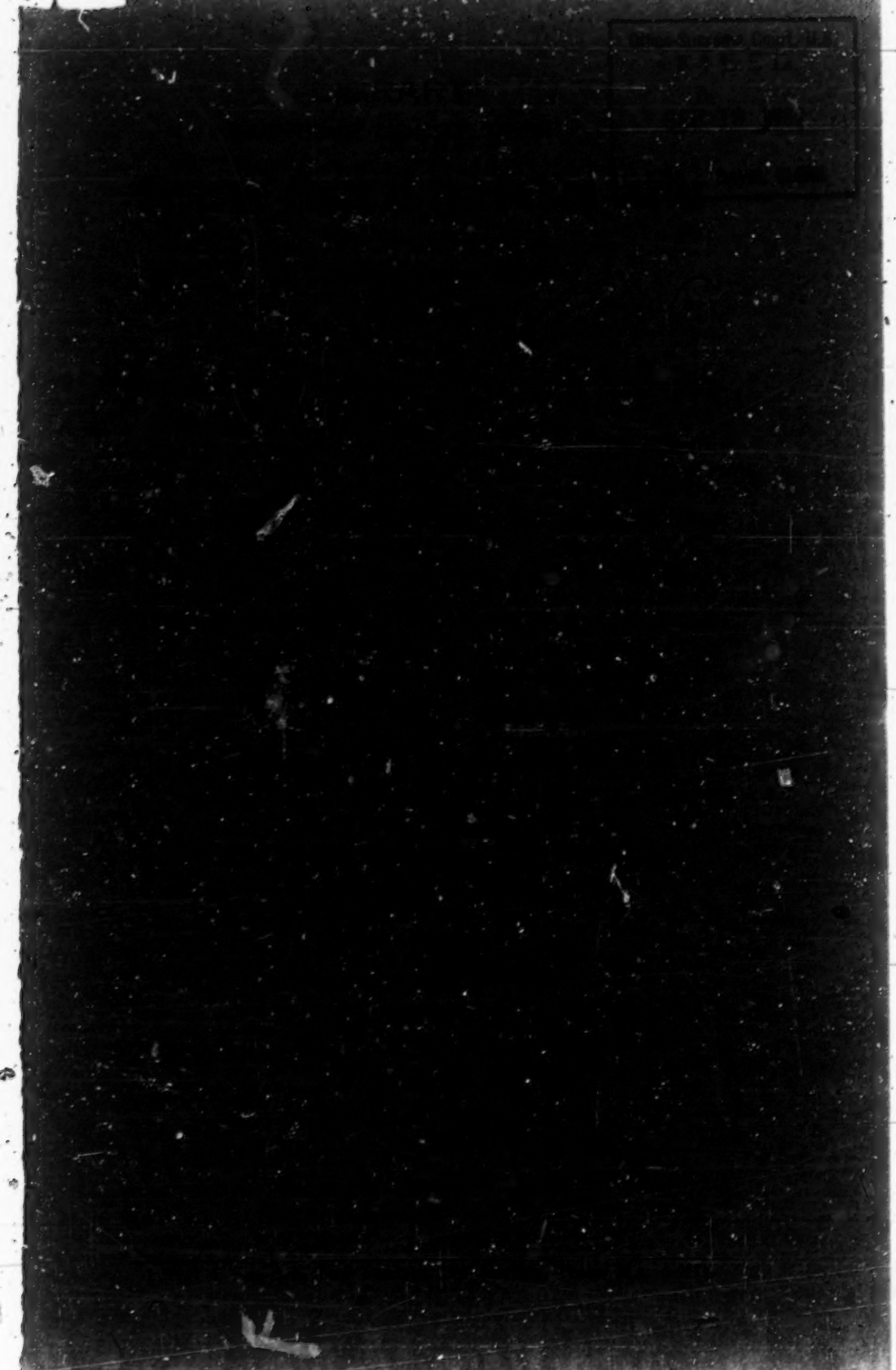

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

No. .....

SOUTHERN CALIFORNIA EDISON COMPANY, a Corporation,

*Appellant,*

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

*Appellee,*

SOUTHERN CALIFORNIA GAS COMPANY and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA,

*Real Parties in Interest.*

## STATEMENT AS TO JURISDICTION.

In compliance with Rule 15 of the revised rules of the Supreme Court of the United States, appellant submits herewith its statement as to the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the Supreme Court of the State of California, in civil action S. F. No. 20773, denying a hearing on a Petition for Writ of Review or Mandamus, from a Decision, and Order, of the Public Utilities Commission of the State of California.

## INTRODUCTION.

The instant appeal is taken from a judgment of the California Supreme Court affirming a decision of the Public Utilities Commission of the State of California ("California Commission") granting a certificate of public convenience and necessity for construction of a natural gas pipeline project, termed "Rock Springs."[1] As proposed, the Rock Springs project is designed to serve, in a large measure, a market already committed by contract to another source of natural gas service. The market in question consists of a substantial portion of the natural gas load of appellant, the Southern California Edison Company ("Edison"). Edison is committed by contractual arrangements to natural gas service that would be provided by another natural gas pipeline project, termed "Pemex", or Edison-CGT. The "Pemex"[2] project was pending before the California Commission when it issued its decision certificating the "Rock Springs" project. At that time the "Pemex" proceedings had not been completed, for some testimony and evidence were yet to be presented.

The problem, in the case at bar, thus arose in a situation where the California Commission had pending before it two separate pipeline projects, both of which were relying upon a market showing predicated in a large part upon the identical market—namely, the Edison requirements.

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[1]So called by reason of its routing near Rock Springs, Wyoming.

[2]A contraction of the name Petroleos Mexicanos, the decentralized institution of the Mexican government dealing in oil and gas on behalf of that country.

The Commission recognized that one of the principal issues involved in the Rock Springs proceeding was that of the economic feasibility of the project at issue in that proceeding was the question of whether or not the Rock Springs project would be economically feasible without the Edison load; yet in certifying that project the California Commission refused to disclose whether it was certifying it as economically feasible only if the Edison load were served thereby, or if it had determined that the project would be economically feasible even without the Edison load. As was admitted by the parties in the proceeding, both projects could not properly be determined as economically feasible upon the basis of each serving one and the same Edison market. Since, at the time of its decision in the Rock Springs case, the proceedings before the California Commission upon the Pemex project had not been concluded and all of the testimony and evidence had not been presented there clearly was a prejudgment of the Pemex project (the economic feasibility of which was based upon the same market), in violation of the requirements of due process of law under the constitutional guarantees, if the California Commission in certifying the Rock Springs project did so only in reliance upon that project's serving the Edison load. The Commission made no finding upon the economic feasibility of the Rock Springs project without the Edison load, which finding would be necessary to its being certified without an unconstitutional prejudgment of the Pemex project.

Furthermore, your appellant, Edison, has been and now is, a customer of the natural gas companies that would operate the California portion of the "Rock Springs" project, and is also an applicant before the

California Commission for authorization to implement the arrangements for the California portion of the "Pemex" project. Appellant therefore has a dual interest in a proper determination by the Commission as to the "economic feasibility" of the "Rock Springs" project.

## THE OPINION BELOW.

The judgment of the California Supreme Court denying the Petition for Writ of Review or Mandamus was entered by minute order, without opinion, on January 31, 1962. It is reported in 57 Advance California Reports No. 10, dated February 9, 1962, at Minutes, page 1. A copy of the Minute Order is attached hereto as Appendix "A".

The judgment affirmed a decision of the California Public Utilities Commission, contained in a "Supplemental Opinion" identified as Decison No. 62117, dated June 6, 1961, and reported in 58 California Public Utilities Reports 746. This opinion supplemented previous rulings of the Commission, identified as Decision No. 61261, dated December 28, 1960, and reported in 58 California Public Utilities Commission Reports 374, and Decision No. 54955, dated January 5, 1960, and reported in 57 California Public Utilities Commission Reports 485. Copies of these three Decisions were submitted to the California Supreme Court as Exhibits A, B and C, to the Petition for Writ of Review or, in the Alternative, for Writ of Mandamus. This Petition, and the Exhibits, are part of the Record before this Court.

## GROUNDS FOR JURISDICTION.

1. This appeal concerns Decisions of the Public Utilities Commission of the State of California, granting certificates of public convenience and necessity to the Southern California Gas Company and the Southern Counties Gas Company of California (sometimes called "Gas Companies"), for the construction and operation of the California segment of an interstate natural gas pipeline project, which would originate outside of California.

Appellant Edison, as the largest "interruptible" customer of the Gas Companies, along with other parties, appeared before the Commission as an interested party, and questioned whether the proposed pipeline project would be "economically feasible" without the Edison load. Appellant informed the California Commission that to obtain an adequate long-range fuel supply, so as to be able to continue to provide satisfactory electric service, it was attempting to obtain an independent supply of natural gas from sources outside California, and that in the future the two Gas Companies might not continue to supply Appellant with natural gas service as in the past. During the pendency of the proceeding, applications were filed with the California Commission by Appellant, and by the California Gas Transmission Company, for the required authorizations in connection with such independent supply, the Pemex Project.

In the Decisions that were affirmed by the California Supreme Court, whose judgment is the subject of this appeal, the California Commission did not make any findings on the principal issue of economic feasibility,

nor on the inclusion or exclusion of your Appellant in the market relied upon for certification of the Rock Springs project, nor on other principal issues litigated in the proceeding, and necessary to its determination. A petition of your Appellant for Rehearing, on the ground that the Decisions constituted a denial of due process of law, in violation of the federal constitution, was denied by the Commission, without opinion, by order entered June 27, 1961.

The law of California provides that the California Supreme Court is the sole state tribunal with jurisdiction to review an order or decision of the California Commission. The petition of Appellant for such review, was denied by the state Supreme Court, without opinion, on January 31, 1962. (57 A. C. 10; Minutes, p. 1; Appendix A hereto.) Your appellant filed a Notice of Appeal, in the Supreme Court of the State of California, on April 27, 1962. The time for filing the record, and this Statement, with your Honorable Court, was extended by the State Supreme Courts to September 24, 1962.

2. The California statutes involved in this appeal are contained in the state Public Utilities Code, as follows:

a. Issuance of certificates of public convenience and necessity, by the Commission, after hearing: Sections 1001 to 1006. [Stats. 1951, ch. 764; Sec. 1005 was amended by Stat. 1959, ch. 2109, § 1, p. 4906.]

b. Hearings and Rehearings, by the Commission: Sections 310, 1701, 1705, 1709; and 1731, 1732 and 1733. [(Stats. 1951, ch. 764. Sec. 1705 was amended by Stats. 1961, ch. 118, § 1).]

c, Judicial Review of orders and decision of the Commission: Sections 1756 to 1760. [(Stats. 1951, ch. 764).].

The Constitution of the State of California provides for the state Supreme Court, in Sections 1 and 4 of Article VI, and for the state Public Utilities Commission, in Section 22 of Article XII.

The text of these statutory and constitutional provisions is set out verbatim, in Appendix E hereto.

3. Jurisdiction is conferred upon the Supreme Court of the United States to review the decision of the California Supreme Court by direct appeal, by Title 28, United States Code, Section 1257(2).

4. The following cases sustain the jurisdiction of the Supreme Court of the United States to review the judgment of the California Supreme Court, in this case, on direct appeal:

*Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 290, 42 S. Ct. 106, 66 L. Ed. 239;

*Napa Valley Elec. Co. v. Railroad Commission*, 251 U. S. 366, 40 S. Ct. 174, 64 L. Ed. 310;

*Truax v. Corrigan*, 257 U. S. 312, 324, 42 S. Ct. 124, 66 L. Ed. 254;

*Southern Ry. Co. v. Virginia*, 290 U. S. 190, 54 S. Ct. 148, 78 L. Ed. 260.

Reference is also made to *Robertson and Kirkham*, Jurisdiction of the Supreme Court of the United States (1951 Ed.), at pages 21 to 26.

## QUESTIONS PRESENTED BY APPEAL.

(1) Whether the statutes of California establishing the procedure for hearings before the Public Utilities Commission of California, as applied by the Supreme Court of California to provide that the Commission is not thereby required to make known its determination of the principal issues litigated and duly submitted for decision, are repugnant to the requirement of due process of law provided in Article XIV, Section 1, of the Amendments to the Constitution of the United States, on a fair hearing.

(2) Whether the provisions of the statutes and the Constitution of the State of California, as applied by the Supreme Court of that State, as not requiring a review by a judicial tribunal of a decision of the State Public Utilities Commission, when said decision does not set forth the determination of the Commission on the principal issues litigated and duly submitted to it for decision, or the determinations of the Commission on the rights of a party to its proceedings under the Constitution of the United States, are repugnant to the requirement of due process of law provided in Article XIV, Section 1, of the Amendments to the Constitution of the United States.

(3) Whether the provisions of the statutes and the Constitution of the State of California, as applied by the Supreme Court of that state, as not requiring that interested parties be given an opportunity for a fair hearing by the Public Utilities Commission of California on an application for a certificate of public convenience and necessity, are repugnant to the requirements of due process of law provided in Article XIV, Section

1, of the Amendments to the Constitution of the United States of America.

(4) Whether the statutes of California, on the procedure for hearings before the Public Utilities Commission of California, as applied by the Supreme Court of California to provide that the Commission is not obliged to conduct a comparative hearing on applications for certificates of public convenience and necessity, for pipeline construction, although said applications are alleged to be mutually exclusive, are repugnant to the requirement of due process of law, provided in Article XIV, Section 1, of the Amendments to the Constitution of the United States, on a fair hearing.

## STATEMENT OF THE CASE.

In the Decisions that are the subject of this appeal the California Commission granted the application of two public utility gas corporations, the Southern California Gas Company and the Southern Counties Gas Company of California, for a certificate that the present or future public convenience and necessity required, or would require, the construction in California of an extension to the existing systems of the two Gas Companies which would permit purchase of additional natural gas from the El Paso Natural Gas Company. As stated above, such extension forms part of the pipeline generally described as the "Rock Springs Project."

The two Gas Companies are primarily retail natural gas distribution companies which purchase, distribute and sell, natural gas, in the central and southern parts of the state of California. The California statutes provide that such a corporation shall not begin the

construction of a line, plant or system, nor of certain extensions thereof, without having first obtained a certificate from the California Commission that the present or future public convenience and necessity require or will require such construction. (Public Utilities Code, Sec. 1001.)

The statutes further provide that the California Commission may, after hearing in a contested matter, issue the certificate as prayed for, or refuse to issue it, or issue it for the construction of a portion only of the contemplated plant, system, or extension thereof, or for the partial exercise only of the right or privilege, and may attach to the exercise of the rights granted by the certificate, such terms and conditions as in its judgment the public convenience and necessity require. (Public Utilities Code, Sec. 1005.)

An application for such certificate was filed by the two Gas Companies on November 7, 1958, and was amended on November 18, 1959. The application, as amended, requested a certificate for construction of the California segment of a proposed interstate natural gas pipeline, for the purchase of natural gas by the two Gas Companies from the El Paso Natural Gas Company, at the California-Nevada border. The natural gas would be transported to the border by means of a pipeline to be constructed, in part by El Paso and in part by the Colorado Interstate Gas Company. Colorado would construct 155 miles of 34-inch pipeline from Rock Springs, Wyoming, to Provo, Utah, and El Paso would construct 394.6 miles of 34-inch pipeline from Provo to the Nevada-California border.

The natural gas for the pipeline, it was alleged, would be obtained by El Paso from Colorado Interstate, and from the Pacific Northwest Pipeline Corporation, involving possible Canadian sources. If the project were completed, Colorado Interstate would be able to cancel an existing contract that requires purchase of gas from Pacific Northwest, and would also be able to supply a portion of the gas for this project from its own reserve.

### A. Proceedings Before the Commission.

At the hearing on this application your appellant, Edison, and other parties contested the validity of an economic feasibility showing, relied upon by the Gas Companies, which was based upon the assumption that the Gas Companies would continue to serve the Edison load as in the past, notwithstanding Edison's contractual arrangements to obtain gas service from another source. Edison is a public utility electric corporation which provides electricity to customers in ten southern California counties, including parts of Los Angeles county. Edison consumes a large quantity of natural gas as fuel in the operation of its steam-electric generating plants. It is the largest customer of the two gas companies, and is served by each of them on one of their "interruptible" schedules. Such schedule provides natural gas service that is subject to termination, or "interruption", from time to time, when the "firm" or "regular" customers need all of the available supply.

Edison informed the California Commission that the service provided it by the Gas Companies under such "interruptible" schedule was unstable, and transient in nature, and did not adequately provide for the present

and future needs of Edison's electric customers. Accordingly, Edison felt obliged to obtain a long term independent supply of natural gas providing it with assured annual volumes of gas so it could continue to provide satisfactory electric service; and that in the future it expected to purchase less natural gas from the two Gas Companies, than in the past.

A late filed Exhibit supplied by the Gas Companies at the direction of the California Commission, purported to show the effect a complete loss of the Edison market would produce upon the sales of the two Gas Companies, but the two Gas Companies continued to contend that the economic feasibility of the project should be supported by a market forecast which included estimated sales of natural gas to Edison, for future years, at volumes similar to sales in past years.

**1. Edison Arrangement for Independent Natural Gas Supply: Pemex Project.**

During the pendency of the Gas Companies' applications before the California Commission, Edison did in fact enter into contractual arrangements for an independent supply of natural gas. These arrangements provide for the construction of pipelines which will run from the King Ranch processing plant of the Humble Oil and Refining Company in Texas to the town of Reynosa, Mexico (situated across the river from McAllen, Texas), and across Mexico to the vicinity of Mexicali in Baja, California, and from the Mexico-California border to the Edison steam electric generating stations in California. Such system, if fully powered, would be capable of transporting some 750 million cubic feet per day of natural gas. As designed, the

arrangements contemplate the transportation by Tennessee-California Gas Transmission Company, an affiliate of Tennessee Gas Transmission Company, of some 380 million cubic feet of natural gas per day purchased by Edison from producers in the Gulf Coast area of Texas, to the Texas-Mexico border near Reynosa, Mexico, and the transportation of that gas, together with additional Mexican gas (up to 75 million cubic feet per day), through the Mexican segment of the pipeline to the California-Mexican border near Mexicali, after which California Gas Transmission Company, an affiliate of Tennessee Gas Transmission Company, would transport such gas to certain of the Edison steam electric generating stations in California.

Testimony on this Edison arrangement for an independent gas supply was presented to the Commission in the "Rock Springs" proceeding, and applications for authorization of the California segment of the Pemex project were filed with the California Commission on December 5, 1960, by the California Gas Transmission Company, as Application No. 42931, and by the Southern California Edison Company, as Application No. 42932. Hearings commenced in 1961 on these applications and were concluded in May, 1962. Subject to the filing of briefs and oral argument, the matter is now under submission by the California Commission.

Members of the Commission staff, as well as a witness for the two Gas Companies, asserted in the Rock Springs proceeding that the same Edison natural gas requirements could not be used to justify both the "Rock Springs" project, and the pending Pemex project. The staff recommended, to the Commission, that only the

portion of the "Rock Springs" project which provides for delivery over existing facilities should be approved, and that the two Gas Companies should be authorized to negotiate with the gas suppliers on the remaining portion of the project. The staff also filed a motion for comparative hearing of the Rock Springs project, with the Pemex project, Applications 42931 and 42932. The California Gas Transmission Company, and several oil companies, that had appeared in opposition to the Rock Springs project, endorsed the staff motion.

### B. Decisions of California Public Utilities Commission.

During the course of these proceedings, the California Public Utilities Commission issued three decisions, setting forth Opinions and Orders on the pending application. Two of these decisions, identified as No. 59455 and No. 61261, were interim in nature. (Exhibits B and C to the Petition for Writ of Review or Mandamus.) The third decision, dated June 6, 1961, Decision No. 62117, was entitled "Supplemental Opinion." (Exhibit A to the Petition for Writ of Review or, in the Alternative, for a Writ of Mandamus, filed in the Supreme Court of California.)

In Decision No. 61261 (Exhibit C to Petition for Writ of Review or Mandamus) the Commission itself phrased the three principal issues posed by the "Rock Springs" application, as follows:

(1) Is the project needed?

(2) Is the project economically feasible?

(3) Does the project connect California to new areas and new sources of gas not now available to it?

The Commission summarized what it found to be the main advantages and disadvantages of the Rock Springs Project, and concluded that, in its opinion, the disadvantages outweighed the advantages, unless the Gas Companies could, among other things, obtain contract revisions or new contracts to eliminate the need for a rate increase, to reduce the period before the project would be economically feasible. The Commission also ordered the applicants to prepare and file a revised economic feasibility study showing the economic supply and requirement situation based on outlook approximately as of the date of the new supply contract. At the time of the issuance of this decision, proceedings were then pending before the California Commission upon the proposed Pemex independent gas supply project.

Subsequently, the Gas Companies filed their "Statement of Compliance" with said conditions and after further hearings and the receipt of separate market showings prepared by the Gas Companies, both with and without the Edison load, the Commission issued Decision No. 62117. (Exhibit A to the Petition for Writ of Review, or, in the Alternative, for a Writ of Mandamus.) It could not be ascertained from this decision whether the California Commission certificated the Rock Springs project in reliance upon the Edison load or in reliance upon a determination that the project was economically feasible without the Edison load.

Appellant Edison timely filed a petition for rehearing, pointing out that the Commission's decision was not supported by a finding on economic feasibility and that in particular the Commission did not state whether

its decision was based upon an assumption that the Gas Companies would or would not continue to supply the Edison load as in the past, and that, because it could not be ascertained from the Commission's opinion whether or not it had concluded that the Rock Springs project was economically feasible without the Edison load, it prayed the California Commission to make a specific finding and determination that would remove any possible ambiguity in this regard so as to avoid an unconstitutional prejudgment of the pending Pemex proceeding.

Edison stated among other things, in its petition, that:

> "So long as there exists any possibility of any contention being made, rightly or wrongly, that the California Commission had by implication concluded that the revised Rock Springs Project and the Edison-TGT Project were mutually exclusive, the action of the Commission so construed, would constitute an unlawful prejudgment of the Edison-TGT Project before the completion of hearings thereon and hence without a fair hearing. This would constitute a violation of Edison's lawful rights and a patent denial of procedural due process of law as guaranteed to it by the Constitution of both the United States and California (cf., Public Utilities Act, Section 1709, and California Constitution, Article I, Section 13, and United States Constitution Fifth Amendment; cf. *Twining v. New Jersey*, 211 U. S. 78, 111-113; *City of Los Angeles v. Oliver*, 102 Cal. App. 299, 323; *American DeForest Wireless Tel. Co. v. Superior Court*, 153 Cal. 533)."

(The Petition For Rehearing is set forth as Exhibit "E" to the Petition For Writ of Review, filed by Edison with the California Supreme Court; see particularly pages 5 and 6 thereof).

The petitions for rehearing, filed by the Edison Company and others, were denied by the Commission, without opinion. (The Commission Order is set forth as Exhibit "F" to the Petition for Writ of Review, filed by Edison with the California Supreme Court.)

The statutes of California provide that after any order or decision has been made by the Commission, any party to the action or proceeding may apply for a rehearing, and if the application for rehearing is denied, the applicant may apply to the Supreme Court of the State for a writ of certiorari or review, for the purpose of having the lawfulness of the original order or decision, or of the order or decision on rehearing, inquired into and determined. (Public Utilities Code, Secs. 1731 and 1756; see Appendix "B" hereto.)

### C. Proceedings Before the California Supreme Court.

Your appellant, Edison, timely filed a Petition for Writ of Review or, in the Alternative, for a writ of Mandamus, in the Supreme Court of the State of California. The petition was directed at the Public Utilities Commission, as respondent, and the Southern California and Southern Counties Gas Companies were also served, and joined in the proceeding, as real parties in interest. In this petition, the proceedings before the California Commission were summarized; and

the pendency of the applications of Edison and the California Gas Transmission Company, before the California Commission, was set forth in detail. (Petition for Writ of Review, paras. III, IV, V, VI and VII.)

Edison specifically pointed out, in paragraph XII of the Petition, that although the Commission had itself recognized three principal issues, the findings of the Commission as contained in the supplemental opinion and order, Decision No. 62117, were ambiguous and uncertain with respect to such issues, and did not disclose what the Commission had determined on the matter of exclusion or inclusion of the natural gas requirements of Edison in the market of the Southern California and Southern Counties Gas Companies. (Sometimes referred to therein as "Southern".)

Edison specifically alleged, in paragraph XIV of the petition, that:

> "To the extent that Respondent Commission, in issuing said orders has relied in any way on a conclusion that Southern will continue, after July 1, 1962, to supply the Petitioner's natural gas requirements for its steam plants, the Commission is in effect prejudging Petitioner's separate application to the Respondent Commission for approval of the Edison-CGT Project before the completion of hearings and submission of briefs, the effect thereof being to deprive Petitioner of its property and property rights, without due process of law. To the extent the Respondent Commission, in issuing said orders, presumes that Edison will be required to take its gas from Southern, the order is unlawful and exceeds the Commission's jurisdiction."

Edison prayed for a hearing in the Supreme Court of California on the ground that the opinion and order of the Commission violated the rights guaranteed the Edison Company under Amendment V, and Section 1 of Amendment XIV, to the Constitution of the United States of America. (Petition for Writ of Review, par. XVI.)

The three opinions of the Commission, including No. 62117; the order setting hearing on the request of the Southern California and the Southern Counties Gas Companies for supplemental orders; the petition for rehearing filed by Edison; and the order denying rehearing, were attached to the Edison Company's petition for writ of review or mandamus filed with the California Supreme Court.

Extracts from the transcripts of proceedings before the California Commission, and certain Exhibits, as well as the Opinion and Order of the Commission on an investigation into gas supply and service in California, were attached to a Memorandum of Points and Authorities filed by Edison with the California Supreme Court in support of the petition for writ of review or mandamus.[2]

Neither Respondent Commission, nor the Real Parties in Interest, filed an answer to the petition for writ of review or mandamus, nor were counter-affidavits

[2]Separate petitions for writs of review from the orders and decisions of the Commission were also filed in the Supreme Court of California by the California Gas Transmission Company, and by Richfield Oil Corporation. These petitions were also denied by the Supreme Court of California, without opinion, on January 31, 1962. (57 Advance California Reports No. 10, dated February 9, 1962, at Minutes, p. 1.) The petitions of these parties are not part of the record on this appeal.

filed against the factual material submitted with Edison's memorandum of points and authorities. The Respondent Commission, and the Gas Companies, as real parties in interest, filed briefs in opposition to the petition. The City of Los Angeles also filed a brief in opposition to the Edison petition. These briefs are included in the record on this appeal.

Under the law of California, the allegations of the petition of Edison for writ of review or mandamus were deemed admitted; for in the absence of an answer the sole issue would be whether the allegations of the petition set forth sufficient cause for a writ to issue. (See Witkin, Bernard E.: CALIFORNIA PROCEDURE, Vol. 3, pp. 2549 and 2553.)

The decision of the California Supreme Court denying the petition of Appellant herein, Edison, was therefore based exclusively upon the pleadings; and it is settled that in determining the legal effect of the facts so alleged, as a deprivation of appellant's legal rights under the XIVth Amendment, the Supreme Court of the United States is at as full liberty to consider them as was the state Supreme Court. (*Truax v. Corrigan*, 257 U. S. 312, 324; 66 L. Ed. 254, 259; *Robertson and Kirkham*, Jurisdiction of the Supreme Court of the United States (1951 Ed.), at pp. 204-205.)

It is also settled that such a decision of the California Supreme Court, without opinion, is a final judicial determination of the validity of the order of the

California Commission, and a proper subject for review by your Honorable Court. (*Napa Valley Elec. Co. v. Railroad Commission*, 257 Fed. 197, aff'd 251 U. S. 366, 40 S. Ct. 174, 66 L. Ed. 310; *People v. Hadley*, 66 Cal. App. 370; *Finn v. R.R. Commission*, 2 Fed. Supp. 891; *Wallace Ranch Water Co. v. Railroad Commission*, 47 F. 2d 8.)

## FEDERAL QUESTIONS SUBSTANTIAL.

The basic issue presented by this appeal is whether the guaranty of due process of law, set forth in Section 1 of Amendment XIV of the Constitution of the United States of America, extends to proceedings of the state agencies and tribunals, that regulate public utilities. This issue is of vital importance, not only to your appellant, which is itself a state regulated public utility, but also to all similar public utilities, and their customers, investors, and suppliers.

Moreover, the issues of fact posed in the instant appeal are in themselves substantial, for they involve both the interest of the several million customers of your Appellant in efficient and economic electric service, and the interest of related parties, in other states, and in Mexico, in the prosecution of an interstate and international natural gas pipeline, that would provide the adequate and efficient natural gas fuel supply needed for such electric service.

We will discuss these several questions of law and fact below, seriatim.

## A. California Statutes Construed as Authorizing State Public Utilities Commission to Issue Certificate Without Fair Hearing of Interested Parties Violated Due Process of Law.

Prior to the instant decision of the California Commission, and the judgment of the California Supreme Court, it had not been contended that the California constitutional and statutory provisions on the state Public Utilities Commission could be construed as authorizing the Commission to issue a certificate of public convenience and necessity without granting interested parties in a contested proceeding a fair hearing, and issuing findings on the issues litigated and submitted for decision. The requirement of a fair hearing, and the issuance of findings, was believed inherent in the status of the Commission, which is a special constitutional tribunal, and also appeared to be required by the applicable statutes.

### 1. Status of California Commission as Special Constitutional Tribunal.

The California Public Utilities Commission was created by the state constitution, and thereby vested with administrative, legislative, and judicial powers, in the regulation of public service industries. (Cal. Const., Art. XII, Secs. 22, 28.) The state legislature, in the Public Utilities Code, has also conferred administrative, legislative and judicial power on the Commission.

The status of the California Commission as a judicial tribunal under the law of California, has been clearly expressed by the California Supreme Court. In the recent decision of *People v. Western Air Lines, Inc.*,

42 Cal. 2d 621; the Court indicated, at page 632, that while the Commission is not a judicial tribunal in a strict sense, it possesses well established and well understood judicial power. (Statements in a former decision, entitled *Stratton v. Railroad Commission*, 196 Cal. 119, that the Commission was not a court, and that its decrees were administrative or legislative, rather than judicial, were overruled as being inconsistent with other California Supreme Court decisions on the subject of the judicial power of the Commission.)

In a recent commentary, one of the attorneys for the Commission described its status as follows:

> "Although not a judicial tribunal in a strict sense, the Commission is nevertheless both a court and an administrative tribunal. (*Pac. Tel. & Tel. v. Eshleman*, 166 Cal. 640.) Legislative and judicial functions have been united in a single agency (*So. Pac. Co. v. Railroad Comm.*, 194 Cal. 734, 738) . . . While Commission orders in many instances are legislative-administrative in character (as in fixing rates or issuing certificates), it has been said that the procedure by which the result is to be reached, the determination of controverted facts between private litigants and disputants, and the decision upon those controverted matters 'are strictly judicial.' (*Pac. Tel. & Tel. v. Eshleman*, 166 Cal. 630.)" [Quoted from article by Roderick Cassidy, Assistant Chief Counsel, in the Foreward to the Public Utilities Code of the State of California, published by the West Publishing Company.]

The former President of the California Commission and for many years its chief counsel, Everett C. McKeage, has specifically described the judicial status and functions of the Commission as follows:

> "The Public Utilities Act provides that no state court, except the Supreme Court to the limited extent provided by that Act, has any jurisdiction or power to interfere in any way with action taken by the Commission. In fact, the Commission is both a court of record and an administrative tribunal and, in many instances, exercises purely judicial function, such function having been taken from the courts by the Legislature and deposited with the Commission pursuant to the plenary authority contained in Article XII of the State Constitution." (McKeage, Public Utility Regulatory Law [Vantage Press, 1956] at pp. 106-107.)

**2. Statutory Provisions on Findings.**

The California statutes applicable to judicial tribunals specifically require findings, and prior to the instant decision it was settled law in California, that failure of a court to make express findings on all material issues raised by the pleadings or otherwise was reversible error. (Code Civ. Proc., Secs. 632, 634; *Frascona v. L. A. Ry. Corp.*, 48 Cal. App. 135, 138; *Engleman v. Greene*, 125 Cal. App. 2d Supp. 882, 886; Witkin, Bernard E., California Procedure, vol. 3, pp. 1833, 1849.) Moreover, the California Public Utilities Code, in Section 310, provides for findings, opinion and orders of the Commission; and in Section 1757 it provides that findings of the Commission on questions of fact shall be final and not subject to review, except by

the state Supreme Court, to determine whether the Commission regularly pursued its authority; with the exception, pursuant to Section 1760, that in any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the state Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the Commission material to the determination of the constitutional question shall not be final.

The instant judgment of the California Supreme Court, construing the applicable statutes as authorizing the Commission to issue a certificate of public convenience and necessity without issuing findings on the issues litigated and submitted for decision, is now the conclusive interpretation of such statutes, and a proper subject for consideration by your Honorable Court, upon appeal. As stated in *Robertson and Kirkham*, Jurisdiction of the Supreme Court of the United States (1951 Ed.), at pp. 23 and 24:

> "And in cases where a state court has held a state statute applicable to a particular set of facts, against the specific contention that if applied to such facts the statute is invalid on federal grounds, the Supreme Court has exercised jurisdiction on appeal, the theory being that the state court has construed and applied the statute as though it had in specific terms been made applicable to the precise facts of the particular case, and has thus sustained its validity as so construed and applied."

The record in the cases at bar clearly shows the failure, or refusal, of the Commission to make known its determination, if any, on the material issues litigated and submitted for decision. As noted above, the Commission itself stated, in the second interim opinion, No. 61261, that one of the three principal issues posed by the pending application was whether the project was economically feasible. Notwithstanding this recognition, in the supplemental opinion, No. 62117, authorizing the Rock Springs project, the California Commission failed or refused to make a finding on this issue, and also failed or refused to find whether the decision was based upon an assumption that the gas companies would, or would not, continue to supply the bulk of Edison's need for gas fuel to generate electricity. On the contrary, the Commission merely found, in the language of the statute, that public convenience and necessity required the issuance of a certificate for the California segment of the proposed pipeline project, as revised.

In the petition for review, filed with the California Supreme Court, Edison specifically alleged, in paragraph XII, this failure of the Commission to make findings on the material issues. This allegation was not denied, nor traversed, by the Commission, nor by the real parties in interest, and is therefore deemed admitted. Moreover, the Commission and the two Gas Companies contended in written briefs filed with the Court, that the Statutes did not require any hearing, nor any findings of fact.

(a) *Commission Argument That California Statutes Authorize Granting of Certificate in Exercise of Absolute and Uncontrolled Discretion.*

The Commission argued, in its brief, that once it had recited a finding in the statutory language of "public convenience and necessity", the Decision must be affirmed, and could not be further reviewed by the state Supreme Court. (P. U. C. Br. p. 9.) This argument was based on the proposition that in any proceeding to ascertain whether a proposal is required by the public convenience and necessity the Commission "must necessarily pass upon the validity of estimates, forecasts and predictions."

The Commission further asserted that in certificate cases the sole standard for resolution was public convenience and necessity, which was said to be very broad and flexible, with a meaning different from case to case. It stated that the standard:

> ". . . is a relative thing. The very word 'necessity' does not connote an absolute; but may, depending upon the facts of the case, mean anything from 'indispensable' to 'expedient'. See *San Diego and Coronado Ferry Co. v. R. Comm., supra,* (210 Cal. at pp. 511-512)."

The Commission's claim that the statutes vested it with absolute discretion to grant or deny a certificate was expressed in its argument that utilities which are potential competitors of a utility applying for a certificate of public convenience and necessity had no *constitutional* rights affected by Commission orders granting a certificate to such utility, and it was "at best doubtful" whether such competitors had a *statutory*

right to complain of such orders. It admitted that the Commission had traditionally accorded them due notice and opportunity to be heard. (P. U. C. Br. pp. 11-12.)

The Commission then carried its argument to the logical conclusion, that the statutes did not provide for a hearing either to applicants, or to competitors who did not own existing systems which might be interfered with by the grant of a certificate. On page 27 of its brief, the Commission specifically stated: "Apparently, applications for certificates of public convenience and necessity may be granted or denied with or without hearing."

(b) *Argument That Findings Not Required.*

The real parties in interest, the Southern California and the Southern Counties Gas Companies, argued to the California Supreme Court, in written briefs, that the applicable state statutes did not require the Commission to make findings on the issues litigated in certificate proceedings. The Gas Companies asserted flatly that except in proceedings to determine the compensation to be paid by a public body condemning the property of a public utility, findings by the Commission were not mandatory, but only permissive. (Gas Companies Br. p. 66.)

The constitutional issue that due process of law requires such regulatory bodies and special tribunals as the California Commission to advise the parties of their findings and determinations on litigated issues was squarely argued by both the Commission, and by the two Gas Companies. They both asserted in their

briefs that a "finding" of public convenience and necessity, that is, *a mere recitation of the statutory language*, complied with the constitutional requirement of due process of law. (Commission Br. pp. 13-23; Gas Companies Br. pp. 65-73.) The Gas Companies pushed this argument to the extreme, and asserted, on page 69 of their Brief, that the rule set forth by your Honorable Court in *Panama Refining Co. v. Ryan*, 293 U. S. 388, 433, 55 S. Ct. 241, 254, 79 L. Ed. 448, and similar cases,[4] that due process requires findings upon jurisdictional facts, should be dismissed as a dictum.

### 3. Due Process Requires State Regulatory Agency to Grant Fair Hearing in Contested Matter and Issue Findings on Applications for Certificate of Public Convenience and Necessity.

We have cited the arguments of the Commission and of the Gas Companies above, at length, for in the face of the uncontradicted allegations of your Appellant, it appears that the judgment of the state Supreme Court, being entered without opinion, represents an adoption of the argument that the applicable California statutes do not require the Commission to conduct a hearing, or issue findings, in a contested case involving applications for a certificate of public convenience and necessity.

It is clear that the state statutes, as so interpreted, violate the requirements of due process of law guaran-

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[4] *Wichita R. and Light Co. v. Public Utilities Commission*, 260 U. S. 48, 43 S. Ct. 51, 67 L. Ed. 124; *Mahler v. Eby*, 264 U. S. 32, 44 S. Ct. 283, 68 L. Ed. 549; *United States v. Chicago M., St. Paul and P. R. Co.*, 249 U. S. 499, 55 S. Ct. 462, 79 L. Ed. 1023; *Beaumont S. L. and W. Ry. Co. v. United States*, 282 U. S. 74, 86, 51 S. Ct. 1, 75 L. Ed. 221.

tend your Appellant and other parties similarly situated, by section 1 of Amendment XIV of the federal constitution. The argument that a special tribunal, or administrative commission, has the unlimited power to grant or deny a certificate of "public convenience or necessity" has been squarely considered, and rejected, by your Honorable Court. Thus, in *Federal Radio Commission v. Nelson Bros. Bond and Mortgage Co.*, 289 U. S. 266, 53 S. Ct. 627, 77 L. Ed. 1166, your Court stated that the criterion that in granting radio station licenses the commission should act as "public convenience interest or necessity requires" should not be interpreted as "setting up a standard so indefinite as to confer an unlimited power." Similarly, your court stated, in *New York Central Securities Corp. v. United States*, 287 U. S. 12, 25, 53 S. Ct. 45, 77 L. Ed. 138, 146, that the term "public interest" was not a concept without ascertainable criteria, but had direct relationship to adequacy of service, to essential conditions of economy and efficiency, and to appropriate provision and best use of facilities. (*Cf.* as to the issuance of certificates of public convenience and necessity, *Railroad Commission v. Southern P. Co.*, 264 U. S. 331, 343, 344, 68 L. Ed. 713, 717, 718, 44 S. Ct. 376.)

The argument of the California Commission, adopted by the California Supreme Court, that the concept of "public convenience and necessity" in the California statutes, is very broad and flexible, with a meaning different from case to case, flatly contradicts the rule established by your Honorable Court. The further argument of the Commission and the Gas Companies, apparently adopted by the California Supreme Court,

that the power to grant or deny certificates of public convenience and necessity, delegated by the legislature to the Commission, may be exercised by the Commission without any regard to standards of reasonableness, and arbitrarily or capriciously, and without making findings of fact or disclosing what it has concluded with respect to the litigated issues, also contradicts the rule established by your Honorable Court. In *Wichita R. and Light Co. v. Public Utilities Commission*, 260 U. S. 48, 43 S. Ct. 51, 67 L. Ed. 124, your Honorable Court ruled as to a state public utility commission that: "When therefore such an administrative agency is required, as a condition precedent to the order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective."

In *Mahler v. Eby*, 264 U. S. 32, 44 S. Ct. 283, 68 L. Ed. 549, your court emphasized that the conclusion of *Wichita R. and Light Co.*, was placed, not only on the language of the state statute, "'. . . but also on general principles of constitutional government." Finally, your court explained the rule as follows, in the case of *Panama Refining Co. v. Ryan*, 293 U. S. 388, 433; 55 S. Ct. 241; 79 L. Ed. 446:

> ". . . due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and if that authority depends on determinations of fact, those determinations must be shown."

The contention that a Regulatory Commission may arbitrarily exercise its powers, without regard to the evidence, was specifically rejected, in the case of *Inter-*

*state Commerce Commission v. Louisville and Nashville R.R.*, 227 U. S. 88, 91, 33 S. Ct. 185, 186, 57 L. Ed. 431. The constitutional guarantee of due process of law applies with equal force to any attempt of a state regulatory Commission to exercise its powers arbitrarily, and without regard to evidence and fact, for as stated in *Southern Ry. Co. v. Virginia*, 290 U. S. 190, 54 S. Ct. 148, 78 L. Ed. 260:

> "A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficiently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power."
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> "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied, if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence.'" (Applying the rule of *Interstate Commerce Commission v. Louisville and Nashville R.R.*, 227 U. S. 88, 91 S. Ct. 185, 186, 57 L. Ed. 431, to proceeding of state administrative agency.)

We submit that the state statutes, as construed and applied by the California Supreme Court in the instant case, to authorize the state Public Utilities Commission to arbitrarily grant or deny applications for certificates of "public convenience and necessity", without a fair hearing, and without making findings on issues litigated and submitted for decision, conflict with the Fourteenth Amendment, as conclusively interpreted by your Honorable Court in the cases cited above. The judgment of the California Supreme Court should be overruled.

(a) *Recitation of Statutory Language on Public Convenience and Necessity Not Sufficient.*

As shown above, the Commission and the Gas Companies also argued to the state Supreme Court that the mere recitation in the Commission decision of the statutory requirement on "public convenience and necessity" served as the finding required by the applicable state statutes. The record shows that the California Supreme Court agreed with this construction of the statute, or adopted the argument that the statutes did not require findings, for findings on the issues submitted for decision, are not to be found in any of the three Commission decisions.

A fair reading of the three interim decisions of the Commission, and particularly Decision No. 62117, shows that the statement on "public convenience and necessity" was not considered by the Commission to be a finding of fact. Moreover, such statement would not be considered as a finding under California law, for it is clearly a conclusion of law, which does not disclose the Commission's determination on the

factual issues. (Compare *Clement v. Dunn* (1931), 114 Cal. App. 60, 73; and *Jackson, etc. Co. v. Bryan-Bethany Irrig. D.* (1934), 136 Cal. App. 375, 380.)

Further, a construction of the statutes to provide that recitation of the statutory language served as a finding on litigated issues would contradict the established rule on decisions of regulatory agencies. This rule was well expressed by your Honorable Court in the case of *United States v. Pierce Auto Freight Lines*, (1945), 327 U. S. 515, 533, 66 S. Ct. 687, 696; 90 L. Ed. 821, as follows:

> "The court undoubtedly did not mean that there was no finding whatever as to fitness, willingness and ability, for the Commission did make such a finding in the statutory language. What was obviously meant was that such an ultimate finding was not enough, as of course it was not . . . in the absence of a basic finding to support it . . ."

This established rule has been consistently recognized, heretofore, as being applicable in the review of administrative findings. Thus, in *Stanislaus County v. U. S.*, 193 Fed. Supp. 145, 147, the court held:

> ". . . A general statement in the language of the statute is not sufficient to support the order in the absence of supporting findings of fact. (*State of Florida v. United States* [1931], 282 U. S. 194, 213; 51 S. Ct. 119, 75 L. Ed. 291.)"

In *Stanislaus County*, as in the instant proceeding, the respondents contended that the order contained a narrative report of the facts on which the decision of the Interstate Commerce Commission was based. The

court stated (*Id.*): ". . . Findings in narrative form may be a sufficient compliance with the ICC's duty to report the facts (*Capital Transit Co. v. United States* (D. C. 1951, 97 Fed. Supp. 614), but the Court must review these findings as directed" by the statute.

Finally, it is evident that the decision of the California Supreme Court cannot be sustained on any theory of "implied" findings, on economic feasibility, and other litigated issues. Any such theory of implied findings would be squarely contrary to the decision of your Honorable Court, in *Securities and Exchange Comm. v. Chenery*, 318 U. S. 63, 80 S. Ct. 454, 87 L. Ed. 626, that where a Commission exercising judicial powers has not made a finding on the issues, the court cannot substitute its discretion and make such a finding for the Commission. As stated in *Wichita R.R. v. Pub. Ut. Comm.*, 260 U. S. 48, 59, 43 S. Ct. 51, 67 L. Ed. 124, 130: The lack of an express finding may not be supplied by implication.

It is submitted that the instant decision of the State Supreme Court, construing the state statutes as authorizing the State Public Utilities Commission (a special tribunal), to grant a certificate of public convenience and necessity, after a contested hearing, without determination of the issues litigated and submitted for decision, and without making findings demonstrating that the order is within the authority of the special constitutional tribunal, is squarely contrary to the requirements of due process of law set forth in Section 1 of Article XIV of the Amendments to the United States Constitution.

This decision is of great significance, not only to your Appellant and to the other parties interested in this particular proceeding, but also to other public utilities, and consumers, and to the general public of California, who have a vital interest in the procedure to be followed by the Public Utilities Commission. More importantly, this decision has a vital importance to State administrative proceedings generally, and particularly the regulation of public utilities by state agencies. The instant decision, as shown above, is squarely contrary to the principles set forth by your Honorable Court on procedural due process, guaranteed by the federal constitution, as applicable to state agencies and federal agencies.

### F. Prejudgment of Pending Application a Violation of Constitutional Provisions on Due Process of Law.

The second ground on which the decision of the State Supreme Court should be reversed, is that it appears to sanction a statutory procedure permitting the California Commission to prejudge pending applications, and to make determinations on pending contested cases, without a full hearing, and without the receipt of all the evidence, or the presentation of argument by the parties.

As shown above, the Gas Companies attempted, for the first time in the proceedings before the California Commission on the "Rock Springs" project, to show economic feasibility upon the basis of a market showing which included estimated sales of gas to your appellant, Edison, involving quantities that were then already committed under contract to other sources of

supply, and upon which proceedings were pending before the California Commission upon a proposed independent gas supply project, with the presentation of evidence by various interested parties in such latter case not yet then completed.

While it is true, as shown above, that evidence had been presented before the California Commission in both proceedings, upon which the Commission might have concluded that the Southern California market may be able to utilize supplies from both the Rock Springs and the Pemex project, the significant factor in this case, is that Appellant, in simple fairness and justice is entitled to have disclosed what the Commission did in fact conclude upon this vital issue, so as to enable it to protect its legal rights, and to permit a reviewing court to determine what the Commission decided, and whether or not such decision was proper.

Such findings are essential, if your appellant is to obtain a fair hearing, without prejudgment, on its pending application on the Pemex project. As indicated in Edison's Petition for Rehearing (Appendix E to Petition for Writ of Review, or Mandamus), so long as there exists any possibility of any contention being made that the California Commission has by implication concluded that the revised Rock Springs Project was economically feasible only in reliance upon the Edison load[5] or so long as there exists any possibility

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[5]Such contentions have been advanced by the Gas Companies in their response to Edison's Petition for Rehearing before the California Commission, and in their presentation and briefs filed with the Federal Power Commission in the Rock Springs proceedings pending before that Commission (*e.g.*, their statement of position and comments on the Presiding Examiner's special

that the California Commission might ultimately conclude that the Rock Springs Project and the Pemex Project were mutually exclusive, the action of the Commission, so construed, would constitute an unlawful prejudgment of the pending Pemex Project.

The necessity for findings on, and determination of the issue of, economic feasibility of the "Rock Springs" project, without the Edison load, was well stated in a recent decision of the Federal Power Commission in the Rock Springs proceedings pending before it as Docket No. G-16235, *et al.* In its Order issued May 17, 1962, the Federal Power Commission specifically considered the question of whether the Rock Springs project could be decided independently of the "Pemex" project. The Federal Power Commission observed that it had previously ruled that: ". . . . since Southern California Edison Company (Edison) is one of the largest customers of the Southern California Gas Company (Southern) which would be served by the Rock Springs project, and since one of the major objectives of the Pemex project is to provide Edison with a source of gas supply independent of Southern, it would be necessary for El Paso to adduce evidence in the reopened Rock Springs proceeding showing whether or not that project would be economically feasible on the assumption that Edison might cease to be a customer of Southern. Evidence with respect to this issue has presumably been introduced into the record in this proceeding."

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findings, page 23, filed in F. P. C. Docket No. G-16235); and by others (*cf.*: Edison's Memorandum of Points and Authorities in Support of Petition for Writ of Review or, in the alternative, for Writ of Mandamus, page 23, which is a part of this record on appeal).

It then stated:

"We have given further consideration to the relationship between the Rock Springs and Pemex projects in the light of the decisions of the courts in such cases as *Ashbacker Radio Company v. F. C. C.*, 326 U. S. 327; *Midwestern Gas Transmission Co. v. F. P. C.*, 258 F. 2d 660, 666-668 (C. A. D. C.); *Delta Airlines, Inc. v. C. A. B.*, 228 F. 2d 17 (C. A. D. C.); and *Delta Airlines, Inc. v. C. A. B.*, 275 F. 2d 632, cert. denied, 326 U. S. 969. It is our opinion that, even assuming that we might grant the applications in the Rock Springs project if we should determine that that project would be economically feasible and otherwise consistent with the public interest were Edison to be lost as a customer to the companies receiving gas from the Rock Springs project, such action might prejudice the rights of the applicants in the pending Pemex proceeding by resulting in a changed factual situation having a substantial adverse impact upon the likelihood that we could subsequently grant the applications involved in the *Pemex* case. Specifically, we are of the opinion that if the record in Rock Springs indicates there would be a substantial excess capacity in the Rock Springs pipeline for a number of years following its completion (assuming that Southern California Edison is lost as a customer to Southern California Gas Company) this would be a factor which we would necessarily have to take into account in determining whether the public interest would be served by also granting the applications for the Pemex project.

"Such a situation would, in our opinion, bring the present proceedings within the ambit of the *Ashbacker* rule, and require, or at least make advisable, simultaneous consideration of the two proceedings rather than any determination of Rock Springs in advance of Pemex. We recognize, of course, that it might eventually develop that either Rock Springs or Pemex, or both, should be denied on their own merits, irrespective of the impact of the other proceeding, or, conversely, we might eventually determine that both projects should be granted. But as we understand the *Ashbacker* rule, which is essentially a rule of basic fairness, it prescribed that there should be joint consideration of two applications not only where it can be determined in advance that they are in fact mutually exclusive, but also whenever it appears that prior action on one will seriously jeopardize the chance of the other being granted. As the court of appeals stated in *Midwestern Gas Transmission Co. v. F. P. C.*, supra, at p. 668, 'The Commission should not adopt procedures that foreclose full inquiry into broad public questions, either patent or latent.'".

It is clear, as stated by the Federal Power Commission, that the relationship between the "Rock Springs" project and the "Pemex" project is such that a determination of the impact of one case upon the other is essential to avoid prejudgment of the pending application. Any such prejudgment of a pending case is a clear violation of the constitutional provisions on due process of law, and any decision that represents such

prejudgment should not become final. (*Tacining v. New Jersey*, 211 U. S. 78, 111-113; *American DeForest Wireless Tel. v. Superior Court*, 153 Cal. 533.) Heretofore, this rule had been recognized by the courts of California, which have stated that:

> ". . . under the American system of justice it is the policy of our law that a person should not be deprived even of a 'permit' to engage in a legitimate business without a fair and impartial hearing and without an opportunity to present evidence for consideration by the licensing authority . . ." *Irvine v. State Board of Equalization* (1940), 40 Cal. App. 2d 280, 284-285.)

The instant decision, insofar as it may be construed to authorize the California Public Utilities Commission to prejudge a pending application prior to hearing thereon, or prior to the completion thereof, is clearly contrary to both the previous decisions of the state Supreme Court and the decisions of your Honorable Court cited above. As the Federal Power Commission has observed, such prejudgment could also ". . . foreclose full inquiry into broad public questions, either patent or latent." For these reasons, as well, the judgment of the California Supreme Court should be overruled.

**1. Due Process Requires Determination of Mutual Exclusivity Prior to Ruling on Application for Certificate.**

That special tribunals, authorized to issue certificates of public convenience and necessity, are obliged to keep an open mind until all of the evidence is presented, and

not to prejudge the issues, is settled by the leading decision of your Honorable Court on this subject, *Ashbacker Radio Corp. v. F. C. C.*, 326 U. S. 327, 66 S. Ct. 148, 90 L. Ed. 108, which has been consistently applied to such federal administrative agencies as the Civil Aeronautics Board and the Federal Power Commission.

In the *Ashbacker* case, involving a certificate of public convenience and necessity for the operation of a radio station, your Honorable Court held that determination of the issue of mutual exclusivity is a rule of substance, a fundamental principle of fair play, and flatly stated: "Legal theory is one thing, but the practicalities are different."

Here, as in *Ashbacker*, we are concerned with the practicality of whether the granting of a certificate of public convenience and necessity to the Rock Springs Project, on the present state of the record, could result in prejudicial prejudgment of the issuance of a certificate of public convenience and necessity for the pending Pemex project.

The *Ashbacker* rule clearly requires a determination on the issue of mutual exclusivity, when the allegation is presented before such a special tribunal or administrative body. (*Cf. Northeastern Gas Transp. Co. v. Fed. Power Comm.*, 195 F. 2d 872, 877-878; 881; *Midwestern Gas Transmission Co. v. F. P. C.*, 103 U. S. App. D. C. 60, 258 F. 2d 660, judgment vacated as moot in 358 U. S. 280, 79 S. Ct. 316, 3 L. Ed. 2d 299; (Kenneth Culp Davis, Administrative Law Treatise, vol. 1, page 575, citing *Delta Air Lines v. CAB* [1955], 97 U. S. App. D. C. 46, 228 F. 2d 17.)

In the proceedings before the California Supreme Court the respondent California Commission argued that the *Ashbacker* doctrine did not apply to hearings conducted by the Commission under the California statutes. (P. U. C. Brief, pp. 26-28.) It contended that the *Ashbacker* decision was predicated upon a Congressional mandate to the Federal Communications Commission to afford an applicant a hearing before denial of his application; and that the *Ashbacker* rule did not apply under California law on the issuance of certificates of public convenience and necessity because the California statutes do not guarantee applicants or competitors who do not own existing systems which may be "interfered with" by the grant of a certificate a hearing.

The Gas Companies argued to the Supreme Court of California that the *Ashbacker* doctrine merely concerned "administrative-law jargon" for a form of consolidation of cases (Gas Companies Br., p. 45, footnote 28), and should be judged by the same standards as a consolidation of civil proceedings. (Gas Companies Br. pp. 48-58.)

It is submitted that the *Ashbacker* doctrine is more than a rule of federal statutory interpretation, and is not similar to the civil procedure of consolidation. On the contrary, we submit that in *Ashbacker* your Honorable Court squarely laid down the principal that as a matter of procedural due process of law, an applicant for a certificate of public convenience and necessity is entitled to a hearing, particularly on the issues of public convenience and necessity, and could not be deprived of such hearing nor deprived of a certificate that might

better serve the public than that of competing applicants, on the theory of mutual exclusivity and the accident of a prior filing in point of time.[8] This rule is clearly applicable to proceedings of State tribunals authorized to issue certificates of public convenience and necessity; insofar as the statutes of California are construed by the State Supreme Court as not requiring such hearing (as argued by the California Commission and the Gas Companies) such statutes are clearly invalid under the Federal Constitution.

### C. California Statutes Delegating Unlimited Power to State Public Utilities Commission and Precluding State Judicial Review Violate Due Process Clause.

In denying the petition of your Appellant for review of the California Commission decision, in the case at bar, the California Supreme Court apparently construed the applicable state statutes as authorizing the California Commission to issue a certificate of public convenience and necessity without making findings, or disclosing its findings and determinations, on the issues litigated and submitted for decision. As specifically alleged in the Edison petition at paragraphs XIII and XIV, such issues concerned the power of the California Commission to require Edison to continue to take natural gas service from the Gas Companies, and adversely to prejudice and prejudge the pending Edison application for a pipeline project certificate.

To the extent that the California Commission decision is based upon the assumption of a power to re-

[8] (See also Vol. I, Davis Administrative Law, pp. 572-576.)

quire Edison to continue to take natural gas service from the Gas Companies (as a captive customer), or (as an adverse prejudgment of the pending Edison application for a pipeline project certificate, the California Commission has deprived Edison of its property and property rights.

And it is settled that state statutes which do not provide for an independent review, by a state court, of orders of a regulatory commission or special tribunal, confiscating property rights, are void, because of conflict with the due process clause of the Fourteenth Amendment. As stated by your Honorable Court in the case of *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, 40 S. Ct. 527, 64 L. Ed. 908: "In all such cases, if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, 14th Amendment." (Accord: *Bluefield Water Works etc. Co. v. Public Service Commission*, 262 U. S. 679, 689, 43 S. Ct. 675, 67 L. Ed. 1176; See also concurring opinion of Justice Frankfurter, in *Alabama Public Service Commission v. Southern Ry. Co.*, 341 U. S. 341, 362, 71 S. Ct. 762, 95 L. Ed. 1002, 1015: "For every state must afford judicial review in its courts of a claim under the Due Process Clause if such claim would give a federal court jurisdiction. In the absence of such judicial review in the State courts, State action under the doctrine of the Ben Avon Case, 253 U. S. 287, 64 L. Ed. 908, 40 S. Ct. 527, would be nugatory because unconstitutional.")

Heretofore, it had been firmly established in the law of California that under the State Constitution and the Public Utilities Act the California Supreme Court would exercise an independent judgment on the findings and conclusions of the California Commission when a substantial Federal Constitutional question was involved and appropriately raised. (*Southern Cal. Edison Co. v. R.R. Comm.*, 6 Cal. 2d 737.) In the proceedings before the California Supreme Court in the instant matter, the respondent Public Utilities Commission argued that in certificate cases the mere statement by the Commission that a proposed project was justified by public convenience and necessity precluded any review of the decision whatsoever by the California Supreme Court (Comm. Br. p. 9.) A similar argument was advanced by the Gas Companies. (Gas Companies Br. p. 34.)

Insofar as the California Supreme Court adopted these arguments on Public Utilities Code Sections 1001 and 1005 on the grant of certificates of public convenience and necessity, and Sections 1757 and 1760 on judicial review of determinations of the Commission, as establishing a statutory scheme that would preclude an independent judicial review of federal constitutional questions, the statutes are clearly repugnant to the constitutional provisions on due process, for they are contrary to the decisions of your Honorable Court cited above.

In short, the decision in the instant case appears to construe the applicable constitutional and statutory provisions of California as authorizing the State Public Utilities Commission, in contested proceedings, arbitrarily and without a hearing, to issue a certificate of

public convenience and necessity to one utility, and deny it to another, without a judicial review by the California Supreme Court, or any other branch of the state judicial system, of such determinations." It is submitted that such a statutory scheme clearly violates the federal Constitutional requirement of due process of law.

## MATTER MERITS PLENARY CONSIDERATION.

The record shows that the issues of fact and law posed by this Appeal, are of such consequence to the parties directly concerned, and to all other parties concerned with due process in the proceedings of state regulatory agencies that the matter merits plenary consideration, with briefs on the merits, and oral argument.

The issues of law raised by the uncontradicted allegations in the petition filed by Edison with the California Supreme Court: on the economic feasibility of the "Rock Springs" project, and the probability that it would cause an increase in the rates charged by the two gas companies for natural gas service (Petition, par. XII), and on the possible contention of the California Commission that it could require Edison to continue to take natural gas service from the two Gas Companies (Petition, par. XIII), and the constitutional questions as to the prejudgment of the pending Edison application to certify a segment of an interstate and international natural gas pipeline project, are, we believe sufficiently important in themselves to merit such plenary consideration.

The factual issues and consequences are of equal importance, for the matter presented by this appeal involves the rights of several million people, in the third

largest metropolitan area in our country, to efficient and economic electric service, as well as to adequate natural gas service; the construction of an international gas pipeline project that will encourage trade and commerce between this country and Mexico; and a new and independent source of natural gas fuel for the entire Southern California area.

The resolution of these legal and factual issues is not only of importance in the instant proceeding, and to the pending applications for a certificate from the California Commission for construction of the California segment of the Pemex pipeline project. Such resolution would also be pertinent to proceedings now being conducted by the Federal Power Commission, which is considering both the "Rock Springs" project, as Docket No. GP-16235, *et al.*, and the Pemex project as Docket No. CP 61-172 *et al.*

Further, as indicated in the Statement of the Case, *supra*, the Rock Springs project is directly involved with the legality of the merger attempted by the El Paso Natural Gas Company and the Pacific Northwest Pipe Line Co., suppliers of natural gas to the proposed "Rock Springs" project. The federal government, in a suit filed in a United States District Court for Utah, on July 22, 1957, has alleged that El Paso's acquisition of the stock of Pacific Northwest violated §7 of the Clayton Act.[6]

At the previous term, in Docket No. 187, your Honorable Court decided that the Federal Power Commission should await decision in the antitrust suit before taking action on an application of El Paso for a certificate

[6] 38 Stat. 731, as amended, 64 Stat. 1125, 15 U. S. C. §18.

of public convenience and necessity to acquire Pacific Northwest's assets. (*People of the State of California v. Federal Power Commission, El Paso Natural Gas Company*, 368 U. S. 810, 8 L. Ed. 2d 54, 82 S. Ct. 47.)

In the Brief filed by the People of the State of California, with this Honorable Court, in the *El Paso* case, Docket No. 187, it was stated, at page 28, that the customers of the merged El Paso-Pacific Northwest Co. have been subjected ". . . to rates, charges and service flowing as a result of a potentially illegal combination. The consumer has thus been required to hedge management's bet that the risk of illegality will eventually be obviated." As emphasized at page 48 of the California Brief: "The general stock acquisition offer of El Paso served to 'bail out' the stockholders of Pacific. This weakened El Paso, with no offsetting benefits to El Paso."

The California Brief further asserted, at page 58, that the decision of the Federal Power Commission: ". . . omitted any basic finding permissible from the evidence before it as to the impact of the deficiency of the Pacific system upon the merged system or its impact upon rates. The decision omitted any basic finding as to specific benefits to the customers of the merged systems."

The State of California further asserted that the Federal Power Commission failed to make any specific finding as to "distinct benefits" to the public attainable by the two corporations dealing separately with each.

Finally, California pointed out, at pages 58 and 59 of its Brief, that the Examiner for the Federal Power

Commission had conceded that the prediction of savings was but a "rough estimate of the savings," and contended that "California is entitled to specific findings. Estimates, guesswork, unsupported predictions, matters stated but unproved, are not a sufficient basis for authorizing a merger of this consequence."

Notwithstanding these arguments on the necessity of findings by a regulatory agency, before this Honorable Court by its chief counsel, the California Commission in the case at bar, failed or refused to make findings, or otherwise make known its determination, if any, on the issues which were litigated and submitted to it for decision. Clearly, the arguments of the People of the State of California in the *El Paso* merger case, on the requirement of findings by the Federal Power Commission upon the "economic impact" of the El Paso-Pacific Northwest merger, are equally applicable to this appeal from the judgment of the California Supreme Court on a decision of the California Commission.

Here, as in *El Paso*, a regulatory commission has failed or refused to make any finding on the economic feasibility of the project that is the subject of an application for public convenience and necessity.

The rules applied in the *El Paso* case are, we submit, equally applicable here, for your appellant, and the other interested parties, are entitled to a fair hearing before the California Commission on matters of such importance. Estimates, guess work, unsupported predictions, and matters stated but unproven, are not a sufficient basis to support the decisions that are now before this court on appeal.

## CONCLUSION.

This matter has been brought before your Honorable Court by appeal, as permitted by statute, for as applied and construed by the California Supreme Court in this instance, the applicable California statutes clearly violate the plain meaning of due process of law, and the specific rules consistently applied by your Honorable Court in nullifying attempts of regulatory agencies, whether state or federal, to exercise their powers arbitrarily. We recognize that your Honorable Court may also review the instant decision of the California Supreme Court, by certiorari, under 28 U. S. C. Section 1257(3), on the general ground that the authority exercised by California, in this instance, is repugnant to the due process guaranteed by Section 1 of Amendment XIV of the Constitution of the United States of America. If your Honorable Court deems it appropriate, it is prayed to consider these papers as a petition for such writ. (Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States (1951 Ed.) pp. 43-49.)

It is submitted that we have shown above that the issues presented by this appeal are of major significance. The construction placed upon the applicable statutes by the California Commission and the California Supreme Court as authorizing the Commission to issue a certificate of public convenience and necessity without a fair hearing, and with prejudice to a pending application, is contrary to due process of law. If the judgment of the California Supreme Court affirming the Decision of the California Commission is left standing, it will prejudice related proceedings on this matter, the rights of several million people utilizing electric

service offered by your appellant, and could establish a precedent that would lead other state regulatory agencies to engage in an arbitrary exercise of power. Your Honorable Court is prayed to grant this appeal and reverse the judgment of the California Supreme Court.

Dated: September 18, 1962.

Respectfully submitted,

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## APPENDIX A.

### Order Denying Writ of Review.

In the Supreme Court of the State of California in Bank. S. F. No. 20773.

Southern California Edison Company v. Public Utilities Commission, Etc., et al.; Southern California Gas Company et al., Real Parties in Interest.

Petition for writ of review DENIED.

Filed Jan. 31, 1962.

William I. Sullivan, Clerk.

By R. J. Bell, Deputy.

Gibson, Chief Justice.

# APPENDIX B.

## Constitutional Provisions.

### ARTICLE VI

### Judicial Department

Sec. 1. The judicial power of the State shall be vested in the Senate, sitting as a court of impeachment, in a Supreme Court, district court of appeal, superior courts, municipal courts, and justice courts.

Sec. 4. The Supreme Court shall have appellate jurisdiction on appeal from the superior courts in all cases in equity, except such as arise in the municipal or justices' courts; also in all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine also, in all such probate matters as may be provided by law; also, on questions of law alone, in all criminal cases where judgment of death has been rendered; the said court shall also have appellate jurisdiction in all cases, matters and proceedings pending before a district court of appeal, which shall be ordered by the Supreme Court to be transferred to itself for hearing and decision, as hereinafter provided. The said court shall also have power to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all other writs necessary or proper to the complete exercise of its appellate jurisdiction. Each of the justices shall have power to issue writs of habeas corpus to any part of the State, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the Supreme Court or before any superior court in the State, or before any judge thereof.

## ARTICLE XII

Sec. 22. The Railroad Commission is continued in existence as the Public Utilities Commission, which shall consist of five members. The commission shall be appointed by the Governor from the State at large; provided, that the Legislature, in its discretion, may divide the State into districts for the purpose of such appointments, said districts to be as nearly equal in population as practicable; and provided further that the three commissioners in office at the time this section takes effect shall serve out the term for which they were elected, and that two additional commissioners shall be appointed by the Governor immediately after the adoption of this section, to hold office during the same term. Upon the expiration of said term, the term of office of each commissioner thereafter shall be six years, except the commissioners first appointed hereunder after such expiration, one of whom shall be appointed to hold office until January 1, 1917, two until January 1, 1919, and two until January 1, 1921. Whenever a vacancy in the office of commissioner shall occur, the Governor shall forthwith appoint a qualified person to fill the same for the unexpired term. Every appointment made by the Governor to the commission shall be subject to the advice and consent of a majority of the members elected to the Senate, except that if a vacancy occurs when the Legislature is not in session, the Governor may issue an interim commission which shall expire on the last day of the next regular or special session of the Legislature. Commissioners appointed for regular terms shall, at the beginning of the term for which they are appointed, and those appointed to fill vacancies, shall, immediately

upon their appointment, enter upon the duties of their offices. The Legislature shall fix the salaries of the commissioners, but pending such action the salaries of the commissioners, their officers and employees shall remain as now fixed by law. The Legislature shall have the power, by a two-thirds vote of all members elected to each House, to remove any one or more of said commissioners from office for dereliction of duty or corruption or incompetency. All of said commissioners shall be qualified electors of this State, and no person in the employ of or holding any official relation to any person, firm or corporation, which said person, firm or corporation is subject to regulation by said Public Utilities Commission and no person owning stock or bonds of any such corporation or who is in any manner pecuniarily interested therein, shall be appointed to or hold the office of Public Utilities Commissioner. No vacancy in the commission shall impair the right of the remaining commissioners to exercise all the powers of the commission. The act of a majority of the commissioners when in session as a board shall be deemed to be the act of the commission; but any investigation, inquiry or hearing which the commission has power to undertake or to hold may be undertaken or held by or before any commissioner designated for the purpose by the commission, and every order made by a commissioner so designated, pursuant to such inquiry, investigation or hearing, when approved or confirmed by the commission and ordered filed in its office, shall be deemed to be the order of the commission.

Said commission shall have the power to establish rates of charges for the transportation of passengers

and freight by railroads and other transportation companies, and no railroad or other transportation company shall charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or freight, or for any service in connection therewith, between the points named in any tariff of rates, established by said commission than the rates, fares and charges which are specified in such tariff. The commission shall have the further power to examine books, records and papers of all railroad and other transportation companies; to hear and determine complaints against railroad and other transportation companies; to issue subpenas and all necessary process and send for persons and papers; and the commission and each of the commissioners shall have the power to administer oaths, take testimony and punish for contempt in the same manner and to the same extent as courts of record; the commission may prescribe a uniform system of accounts to be kept by all railroad and other transportation companies.

No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon the Public Utilities Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the Public Utilities Commission in this Constitution, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution.

The provisions of this section shall not be construed to repeal in whole or in part any existing law not inconsistent herewith, and the "Railroad Commission Act"

of this State approved February 10, 1911, shall be construed with reference to this constitutional provision and any other constitutional provision becoming operative concurrently herewith. And the said act shall have the same force and effect as if the same had been passed after the adoption of this provision of the Constitution and of all other provisions adopted concurrently herewith, except that the three commissioners referred to in said act shall be held and construed to be the five commissioners provided for herein.

Whenever in this Constitution or the laws of this State "Railroad Commission" is used, it shall be deemed to refer to the Public Utilities Commission. (Amendment adopted November 5, 1946.)

## Statutory Provisions: State of California, Public Utilities Code.

310. A majority of the commissioners shall constitute a quorum for the transaction of any business, for the performance of any duty, or for the exercise of any power of the commission. Any investigation, inquiry, or hearing which the commission has power to undertake or to hold may be undertaken or held by or before any commissioner or commissioners designated for the purpose by the commission. The evidence in any investigation, inquiry, or hearing may be taken by the commissioner or commissioners to whom such investigation, inquiry, or hearing has been assigned or, in his or their behalf, by an examiner designated for that purpose. Every finding, opinion, and order made by the commissioner or commissioners so designated, pursuant to such investigation, inquiry, or hearing,

when approved or confirmed by the commission and ordered filed in its office, shall be deemed to be the finding, opinion, and order of the commission.

Chapter 5. Certificates of Public Convenience and Necessity. Article 1. Specified Utilities.

1001. No railroad corporation whose railroad is operated primarily by electric energy, street railroad corporation, gas corporation, electrical corporation, telegraph corporation, telephone corporation, or water corporation shall begin the construction of a street railroad, or of a line, plant, or system, or of any extension thereof, without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction.

This article shall not be construed to require any such corporation to secure such certificate for an extension within any city or city and county within which it has theretofore lawfully commenced operations, or for an extension into territory, either within or without a city or city and county contiguous to its street railroad, or line, plant, or system, and not theretofore served by a public utility of like character, or for an extension within or to territory already served by it, necessary in the ordinary course of its business. If any public utility, in constructing or extending its line, plant, or system, interferes or is about to interfere with the operation of the line, plant, or system of any other public utility, already constructed, the commission, on complaint of the public utility claiming to be injuriously affected, may, after hearing, make such order and prescribe such terms and conditions for the

location of the lines, plants, or systems affected as to it may seem just and reasonable.

1002. No public utility of a class specified in Section 1001 shall henceforth exercise any right or privilege under any franchise or permit hereafter granted, or under any franchise or permit heretofore granted but not heretofore actually exercised, or the exercise of which has been suspended for more than one year, without first having obtained from the commission a certificate that public convenience and necessity require the exercise of such right or privilege. This section shall not validate any right or privilege now invalid or hereafter becoming invalid under any law of this State.

1003. If a public utility desires to exercise a right or privilege under a franchise or permit which it contemplates securing, but which has not as yet been granted to it, such public utility may apply to the commission for an order preliminary to the issue of the certificate. The commission may thereupon make an order declaring that it will, upon application, under such rules as it prescribes, issue the desired certificate upon such terms and conditions as it designates, after the public utility has obtained the contemplated franchise or permit. Upon the presentation to the commission of evidence satisfactory to it that the franchise or permit has been secured by the public utility, the commission shall issue the certificate.

1004. Before any certificate may issue, under this article, a certified copy of its articles of incorporation or charter, if the applicant is a corporation, shall be

filed in the office of the commission. Every applicant for a certificate shall file in the office of the commission such evidence as is required by the commission to show that the applicant has received the required consent, franchise, or permit of the proper county, city and county, city, or other public authority.

1005. The commission may, with or without hearing, issue the certificate as prayed for, or refuse to issue it, or issue it for the construction of a portion only of the contemplated street railroad line, plant, or system, or extension thereof, or for the partial exercise only of the right or privilege, and may attach to the exercise of the rights granted by the certificate such terms and conditions, including provisions for the acquisition by the public of the franchise or permit and all rights acquired thereunder and all works constructed or maintained by authority thereof, as in its judgment the public convenience and necessity require; provided, however, upon timely application for a hearing by any person entitled to be heard thereat, the commission, before issuing or refusing to issue the certificate, shall hold a hearing thereon.

1006. When a complaint has been filed with the commission alleging that a public utility of the class specified in Section 1001 is engaged or is about to engage in construction work without having secured from the commission a certificate of public convenience and necessity as required by this article, the commission may, with or without notice, make its order requiring the public utility complained of to cease and desist from such construction until the commission makes and files its decision on the complaint, or until the further order of the commission.

## Chapter 9. Hearings And Judicial Review.

### Article 1. Hearings

1701. All hearings, investigations, and proceedings shall be governed by this part and by rules of practice and procedure adopted by the commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision or rule made, approved, or confirmed by the commission.

1705. At the time fixed for any hearing before the commission or a commissioner, or the time to which the hearing has been continued, the complainant and the corporation or person complained of, and such corporations or persons as the commission allows to intervene, shall be entitled to be heard and to introduce evidence. The commission shall issue process to enforce the attendance of all necessary witnesses. After the conclusion of the hearing, the commission shall make and file its order, containing its decision. The decision shall contain, separately stated, findings of fact and conclusions of law by the commission on all issues material to the order or decision. A copy of such order, certified under the seal of the commission, shall be served upon the corporation or person complained of, or his or its attorney. The order shall, of its own force, take effect and become operative 20 days after the service thereof, except as otherwise provided, and shall continue in force either for a period designated in it or until changed or abrogated by the commission. If the commission believes that an order cannot be complied with within 20 days, it may pre-

scribe such additional time as in its judgment is reasonably necessary to comply with the order, and may on application and for good cause shown, extend the time for compliance fixed in its order.

1709. In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive.

Article 2. Rehearings

1731. After any order or decision has been made by the commission, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in the action or proceeding and specified in the application for rehearing. The commission may grant and hold a rehearing on those matters, if in its judgment sufficient reason is made to appear. No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless the corporation or person has made, before the effective date of the order or decision, application to the commission for a rehearing.

1732. The application for a rehearing shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful. No corporation or person shall in any court urge or rely on any ground not so set forth in the application.

1733. Any application for a rehearing made 10 days or more before the effective date of the order as to which a rehearing is sought, shall be either granted or denied before the effective date, or the order shall

stand suspended until the application is granted or denied. Any application for a rehearing made within less than 10 days before the effective date of the order as to which a rehearing is sought, and not granted within 20 days, may be taken by the party making the application to be denied, unless the effective date of the order is extended for the period of the pendency of the application.

Article 3. Judicial Review.

1756. Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable not later than 30 days after the date of issuance, and shall direct the commission to certify its record in the case to the court. On the return day, the cause shall be heard by the Supreme Court, unless for a good reason shown it is continued.

1757. No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State. The findings and conclusions of the commission on questions of fact shall

be final and shall not be subject to review except as provided in this article. Such questions of fact shall include ultimate fact and the findings and conclusions of the commission on reasonableness and discrimination.

1758. The commission and each party to the action or proceeding before the commission may appear in the review proceeding. Upon the hearing the Supreme Court shall enter judgment either affirming or setting aside the order or decision of the commission. The provisions of the Code of Civil Procedure relating to writs of review, shall, so far as applicable and not in conflict with the provisions of this part, apply to proceedings instituted in the Supreme Court under the provisions of this article.

1759. No court of this State, except the Supreme Court to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, except that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases.

1760. In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

No. 445.

SOUTHERN CALIFORNIA EDISON COMPANY, a corporation,
*Appellant,*

*vs.*

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
*Appellee,*

SOUTHERN CALIFORNIA GAS COMPANY and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA,
*Real Parties in Interest.*

## Motion of Southern California Gas Company and Southern Counties Gas Company of California to Correct Title and Caption of the Case.

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*Real Parties in Interest.*

## Motion of Southern California Gas Company and Southern Counties Gas Company of California to Correct Title and Caption of the Case.

Southern California Gas Company and Southern Counties Gas Company of California hereby move for an order permitting them to appear as appellees herein, and correcting and amending the title and caption of the within cause so as to describe and designate them as appellees herein.

This motion is made on the ground that the moving parties were below and are here parties to and in the cause adversary to the appellant and are, therefore, entitled to be treated as, and to have all the rights and privileges of, appellees.

The facts on which this motion is based are: Appellant and the so-called "real parties in interest" are, and from the beginning of this litigation have been, adversary to each other. The cause below was an application by these moving parties made in and to the Public Utilities Commission of the State of California for a certificate that public convenience and necessity require the construction, operation and maintenance by them of a pipeline for the transportation and sale of gas to the public. The appellant herein appeared in said cause as a party, designated in the California practice as an "interested party," and as such opposed the granting of the certificate sought by these moving parties. The Commission granted the certificate whereupon the appellant here petitioned the Supreme Court of the State of California to issue a writ of review in order to bring the cause before it for review and upon such review to annul the order of the Commission granting the certificate. These moving parties appeared in the Supreme Court in a capacity designated in the California practice as "real parties in interest" and there opposed the issuance of a writ of review.

In the California practice the nominal party-respondent to a petition for a writ of review is the Commission. The other parties-litigant, aside from the petitioner, are called "real parties in interest." The "real parties in interest" are in fact, and have all the right and privileges of, an actual party-respondent in the litigation; and they are adverse to the petitioner. The

state Supreme Court denied appellant's petition for a writ of review. Such a denial amounts in the California practice to an affirmance of the Commission's order on the merits. It is from the state Supreme Court's judgment of denial that the within appeal is taken. The notice of appeal was served upon these moving parties but designated them by their designation in the State Supreme Court, *i.e.*, "real parties in interest." In directly analogous circumstances a motion such as this one has been granted by this Court. [*McCaw v. Superior Court*, 369 U. S. 874.]

Dated: October 12, 1962.

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# In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 445

SOUTHERN CALIFORNIA EDISON COMPANY, a corporation,

*Appellant,*

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

*Appellee,*

SOUTHERN CALIFORNIA GAS COMPANY and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA,

*Real Parties in Interest.*

On Appeal from the Supreme Court of the State of California

## Motion to Dismiss Appeal

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# In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 445

SOUTHERN CALIFORNIA EDISON COMPANY, a corporation,
*Appellant,*

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
*Appellee,*

SOUTHERN CALIFORNIA GAS COMPANY and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA,
*Real Parties in Interest.*

On Appeal from the Supreme Court of the State of California

## Motion to Dismiss Appeal

The Public Utilities Commission of the State of California, appearing herein as appellee, moves this Court to dismiss for want of jurisdiction the appeal taken herein by appellant above-named upon the following grounds:

1. Appellant has no standing to assert in this Court the constitutional claims specified in the Jurisdictional Statement.

2. The appeal does not present a substantial federal question.

## OPINIONS BELOW

The judgment of the Supreme Court of California denying a writ of review or mandamus was rendered without opinion. It is reported in 57 Advance California Reports, No. 10, Minutes, page 1.

The decisions of the Public Utilities Commission of California, Decisions Nos. 59455, 61261, and 62117, are reported in 57 California Public Utilitjes Reports 485, 58 California Public Utilities Reports 374, and 58 California Public Utilities Reports 746, respectively.

## THE QUESTIONS PRESENTED

The only questions properly before this Court are whether the appellant has standing to maintain this appeal and whether the appeal presents a substantial federal question. All four alleged federal questions presented by appellant's Jurisdictional Statement (pp. 8-9) are unsubstantial. This will be demonstrated in our argument.

## PRELIMINARY STATEMENT.

Appellant has seemingly taken a direct appeal to this Court from a decision of the Supreme Court of the State of California under the terms of 28 U.S.C., Section 1257(2). Appellant recognizes that *certiorari* is a possible method of review herein pursuant to 28 U.S.C., Section 1257(3) and has prayed this Court to consider its jurisdictional statement as an alternative petition for writ of *certiorari*.

In an attempt to conserve the time of this Court, appellee Commission has chosen to consider the document filed by appellant as a jurisdictional statement called for by Rule 15 of the Rules of this Court. The motion to dismiss will be accordingly directed thereto.

Should the Court, however, deem appellant's papers a petition for writ of *certiorari* a more detailed response than here made would become necessary. In such case appellee Commission respectfully requests that it be granted permission to file a more extensive answer than that which is contained herein.

## STATEMENT OF THE CASE

On November 7, 1958 Southern California Gas Company and Southern Counties Gas Company of California (Gas Companies), real parties in interest herein, filed an application with the California Public Utilities Commission (appellee Commission) which sought a certificate of public convenience and necessity under Section 1001 of the California Public Utilities Code. The subject of the certificate applied for was construction and operation of a natural gas pipeline within the State of California from a point near the California-Nevada border to Newberry, California.

The proposed California pipeline was a section of an interstate pipeline originating near Rock Springs, Wyoming, and extending to California. This undertaking is commonly referred to as the Rock Springs project and would facilitate the sale of natural gas by El Paso Natural Gas Company to the Gas Companies.

Twenty-five days of public hearing were held upon this application from January 13, 1959 to July 27, 1960. Southern California Edison Company, appellant herein, entered

an appearance in the Commission proceedings as an interested party.

Appellant is a public utility electrical corporation which purchases gas used for generating electrical power on an interruptible service basis; i.e., appellant's service may be interrupted at times additional gas is needed to satisfy the needs of firm, or non-industrial, customers. Appellant participated actively in the hearings on the Rock Springs application, its position being that its attempts to procure an independent source of gas and the impact of its projected withdrawal from the Gas Companies market should it be successful in its attempts were matters for Commission consideration.

On December 5, 1960 appellant and California Gas Transmission Company filed applications with the appellee Commission for a certificate of public convenience and necessity, which would authorize construction of a natural gas pipeline from the California-Mexico border to certain of appellant's generating plants in California. This pipeline was part of an overall project that would transport gas from Texas, across the Texas-Mexico border, thence across Mexico into California. This pipeline is known as the Pemex project. Hearings on the Pemex applications were begun in January, 1961 and were concluded in May, 1962.

On December 28, 1960 the appellee Commission conditionally granted a certificate of public convenience and necessity to the Gas Companies which authorized the California segment of the Rock Springs project. (Decision No. 61261, Ptn.,[1] Appx., Exh. C.).

The Gas Companies subsequently filed with appellee Commission a "Statement of Compliance with Conditions and Request for Issuance of Supplemental Order Authorizing

1. Ptn.—"Petition for Writ of Review or, in the Alternative, for a Writ of Mandamus."

Construction." Hearing was held on this matter and appellant again appeared and was heard.

Following this hearing, on June 6, 1961, the Commission issued its Decision No. 62117 (Ptn., Appx., Exh. A) wherein it was expressly found that the Gas Companies had complied with all of the conditions prescribed by the prior decision. The certificate of public convenience and necessity previously granted was made applicable to the Rock Springs pipeline construction.

Appellant petitioned the Commission for a rehearing of Decision No. 62117 (Ptn., Appx., Exh. E). This was denied (Ptn., Appx., Exh. F).

A petition for writ of review or, in the alternative, for a writ of mandamus was filed in the California Supreme Court (Ptn., Vol. I). The court denied the petition without opinion (Jur. St.[2] Appx. A). This appeal follows that decision.

Both the Rock Springs project and that of Pemex require a certificate of public convenience and necessity from the Federal Power Commission under the terms of Section 7(c) of the Natural Gas Act (15 U.S.C. § 717f(c))[3] Applications are presently before that Commission in this regard. (The Pemex project is covered by F.P.C. Docket No. CP 61-172 et al., and Rock Springs by F.P.C. Docket No. G-16235 et al.) The Federal Power Commission has not yet authorized either pipeline.

---

2. Jur. St.—"Statement as to Jurisdiction."

3. 15 U.S.C. § 717f(c) "No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the contruction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations; * * *"

The application of appellant for authorization of the California part of the Pemex plan has been submitted to the appellee Commission following extensive hearings and briefs therein. Decision of that matter by appellee is presently pending.

## ARGUMENT

### I. Appellant Has No Standing to Seek Redress in This Court.

Appellant's interest in the certificate proceeding before the Commission was that of "a customer of the natural gas companies that would operate the California portion of the 'Rock Springs' project." (Jur. St. p. 3). Its status as an applicant in the Pemex matter arose subsequent to its appearance in the Rock Springs application. The issue that presents itself at the threshold of this appeal is whether appellant, as a customer of the Gas Companies, has suffered substantial injury so as to complain to this Court of the procedure involved in granting a certificate of public convenience by the Commission to the Gas Companies for construction of an intrastate pipeline. In other words, may appellant urge to this Court that the grant of a license, authorizing construction of a natural gas pipeline by its supplier of gas, constitutes an invasion of *appellant's* constitutionally protected rights?

It is a rudiment of Constitutional law that proper standing to raise a federal question is a condition precedent to review by this Court. The Court recently had occasion to reaffirm this principal. In *Poe v. Ullman*, (1961) 367 US 497, 502-505, Mr. Justice Frankfurter wrote:

> "The restriction of our jurisdiction to cases and controversies within the meaning of Article 3 of the Constitution . . . is not the sole limitation on the exercise of our appellate powers, especially in cases raising

constitutional questions. The policy reflected in numerous cases and over a long period was thus summarized in the oft-quoted statement of Mr. Justice Brandeis: 'The Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.' *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (concurring opinion).

"These considerations press with special urgency in cases challenging legislative action or state judicial action, as repugnant to the Constitution. 'The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity.' *Parker v. County of Los Angeles*, 338 U.S. 327, 333.

"The various doctrines of 'standing,' 'ripeness,' and 'mootness,' which this Court has evolved with particular, though not exclusive, reference to such cases are but several manifestations . . . of the primary conception that federal judicial power is to be exercised to strike down legislation, whether state or federal, only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action. [citations] . . . 'The party who invokes the power [to annul legislation on grounds of its unconstitutionality] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement' . . . [citation]."

Here appellant is a customer of the applicant Gas Companies. It has purchased and presently purchases natural gas from the latter on an interruptible service basis. Appellant would prefer to purchase gas from another source and is a party to pipeline certificate proceedings (Pemex) presently pending before the appellee Commission which would

enable it so to do. For purposes of this appeal, appellant has assumed that the issuance of a certificate in the Rock Springs proceeding *ipso facto* decided the fate of its Pemex application. There is no proof of this to be the fact. The Commission is in no way precluded from finding that the California public convenience and necessity require certification of the Pemex project in addition to Rock Springs. Additionally, if Pemex is denied, it is impossible to perceive wherein appellant suffers injury in that in such case it will remain in its present position as a customer of the real parties in interest herein. It has not been asserted that continuation of the *status quo* results in injury to appellant.

Appellant states that the Rock Springs project is directly tied in with the validity of a merger of the pipeline's suppliers of gas, El Paso Natural Gas Company and Pacific Northwest Pipe Line Co. (Jur. St. p. 48). Since the validity of this merger, upon which the project so depends, is presently being litigated in federal district court (*United States v. El Paso Natural Gas Co.*, Utah, C.D. No. 143-57), it is uncertain whether the Rock Springs project will ever become a reality. Any theoretical injury to appellant is remote under such circumstances.

Furthermore, the Rock Springs project is awaiting certification by the Federal Power Commission. Pemex also requires a certificate from that agency. Since the action of this Commission is not conclusive on the issue of construction of the Rock Springs pipeline, nor is it binding on the Federal Power Commission, for appellant to profess injury in this regard is at best anticipatory.

It is submitted that this appeal must yield to the Court's aforementioned doctrines of "ripeness" and "standing" which compel its dismissal.

## II. The Appeal Does Not Present a Substantial Federal Question.

### A. THERE WAS NO ERROR IN REGARD TO THE FINDINGS AS MADE BY THE COMMISSION.

#### 1. The Commission's Findings Were Consistent With Due Process of Law.

Appellant argues that the California Supreme Court's denial of its petition for writ of review of the Commission's decision impliedly construed the California statutes, which authorize the Commission to grant certificates of public convenience and necessity, so as to dispense with the need for making findings on all issues litigated. Appellant maintains that such a construction is contrary to the requirements of due process of law guaranteed by the Fourteenth Amendment.

This is an erroneous view of the law. The Constitution does not demand that findings be made to the standard advocated by appellant. The sole requirement for the issuance of a certificate of public convenience and necessity is a finding on that issue predicated upon substantial evidence. Due process of law requires no more.

There is no set formula or series of issues which make up public convenience and necessity. *Interstate Commerce Comm. v. Parker* (1945), 326 U.S. 60, 65. *San Diego etc. Ferry Co. v. Railroad Comm.* (1930), 210 Cal. 504, 511. See also Davis, *Administrative Law Treatise*, Sec. 16.11, page 471.)

At the time of the decisions of the Commission here in question, Section 1705 of the California Public Utilities Code provided that "After the conclusion of the hearing, the Commission shall make and file its order, containing its decision." This section was amended during the 1961 sessions of the California Legislature to require that findings be separately stated and presently reads as set forth by appellant (Jur. St., Appx. 3, p. 10).

In a case arising from a comparable provision of the Interstate Commerce Act,[4] this Court has said:

> "As to the contention of appellants that the Commission's order is not supported by essential findings of fact, § 14(1) of the Interstate Commerce Act, 49 U.S.C. § 14(1), does not require the Commission to make detailed findings of fact except in a case where damages are awarded. [citation]. The statute requires the Commission only to file a written report, stating its conclusions, together with its decision and order. This the Commission did, and the essential basis of its judgment, is sufficiently disclosed in its report. Of course § 14(1) does not relieve the Commission of the duty to make the 'basic' or 'quasi-jurisdictional' findings essential to the statutory validity of an order. [citations].[5] And the basic findings essential to the validity of a given order will vary with the statutory authority invoked and the context of the situation presented. [citations]. Here the Commission found, in conformity to the statute invoked, . . . that the differentials prescribed are 'justified as reasonable' and 'necessary and desirable in the public interest' and 'the report, read as a whole, sufficiently expresses the conclusion of the Commission, based upon supporting data. . . .' [citation]. Enough has been 'put of record to enable us to perform the limited task which is ours.' [citation]." *Alabama Great S.R. Co. v. United States* (1950) 340 U.S. 216, 227-228

This language applies equally well to the present case. The Commission acted in conformity with Sections 1001 and

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4. 49 U.S.C. § 14(1) Whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded, such report shall include the findings of fact on which the award is made.

5. "Quasi-jurisdictional" findings are those essential to the existence of authority to enter the order. *Lubetich v. United States* (1942) 315 U.S. 57.

1005 of the California Public Utilities Code as in its judgment the public convenience and necessity required the Rock Springs project. Since Section 1705 did not require the Commission to make subsidiary findings to support the ultimate finding of public convenience and necessity, the Commission pursued a similar course to that of the Interstate Commerce Commission which was endorsed by this Court in the cited case.

The rule of administrative finality also governs this appeal. The rule is that if the Commission's order is based upon adequate findings which, in turn, are supported by substantial evidence, it cannot be disturbed by a court on review, even though the court might consider the Commission's action wrong, and against the weight of the evidence (*Interstate Commerce Comm'n v. Union Pac. R. Co.*, (1912) 222 U.S. 541). Appellant makes no contention that the evidence failed to support the grant of the certificate. Instead its quarrel is with the decisional form employed in issuing such authority.

A case which presented an issue similar to that raised by appellant rejected the argument here advanced. Where the sufficiency of findings to support a reparation order of the Interstate Commerce Commission was in question, it was held:

> "The finding was in the nature of a factual conclusion based upon an evaluation of the entire record. It was not a finding susceptible of demonstration with arithmetical exactness by specific reference to uncontroverted evidence. But it represented the considered judgment of the Commission. We are unable to say that it was contrary to the evidence, that it was not adequately supported by substantial evidence, or that it was arbitrary or capricious. And in a proceeding of this kind it is not the province of the court to sub-

stitute its judgment for that of the Commission in respect to a question of this nature. Expediency or wisdom of the order are not elements for consideration. The field for exertion of the judicial function is exhausted when it appears that there was a rational basis for the intelligent finding or conclusion of the Commission. *Virginia Ry. Co. v. United States* (1926) 272 U.S. 658; *Mississippi Valley Barge Line Co. v. United States* (1934) 292 U.S. 282." (*Johnston Seed Co. v. United States* (10th Cir. 1954) 191 Fed. 2d 228, 231)

The record of the proceedings before the appellee Commission contained ample evidence to support the finding that public convenience and necessity would best be served by certification of the Rock Springs project. Due process of law has been satisfied.

**2. Ultimate Findings by This Commission Are Legally Sufficient Under California Law.**

Appellant has cited several cases of this Court which it is urged enunciate a universal rule that an "ultimate" finding of fact by an administrative tribunal must be supported by essential underlying findings of fact. Appellant's reliance on these cases is misplaced.

In *Southern Pacific Co. v. Railroad Comm.* (1939), 13 Cal. 2d 89, it was argued that a finding by this Commission to the effect that petitioners' proposed rate was "unreasonably low and not justified by transportation conditions" constituted a mere conclusion of law; accordingly, it was urged that this finding must be based upon specified facts. In support of this proposition, petitioners, as do appellants here, cited *Wichita R. & Light Co. v. Public Util. Comm.* (1922), 260 U.S. 48; and *Panama Refining Co. v. Ryan* (1935), 293 U.S. 388. The California Supreme Court stated, at page 109 of 13 Cal. 2d:

"However, it is to be observed that none of those cases [referring to the *Wichita* and *Panama Refining* cases, *inter alia*] presented a situation where the requirements of the particular act under review were expressed in language similar to Section 67 [now codified as Sec. 1757, Pub. Util. Code[6]]; and that although the decisions to which petitioner has referred might be most persuasive were the language of Section 67 not so authoritative and inclusive, it is apparent that in the light of the legislative pronouncements set forth in that section, the several rulings indicated in the cited cases are not controlling."

Appellants also refer to *Mahler v. Eby* (1924) 264 U.S. 32. That case too has no relevance here. Its holding that a federal agency must make findings in support of its orders was based on the Constitutional framework of the federal government in order to prevent an unconstitutional delegation of Congressional legislative power to administrative agencies. The instant case involves the framework of state government, with no similar inhibition (Cal. Const., Art. XII, secs. 22 and 23 (Jur. St. Appx. B, pp. 3-6)).

Similarly, appellant's utilization of the arguments advanced in *California v. Federal Power Commission* (1962) 368 U.S. 810, are not in point. In its brief in that case California attacked a decision of the federal agency on several

6. §1757. No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the Commission as certified to by it. The review shall not be extended further than to determine whether the Commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State. The findings and conclusions of the Commission on questions of fact shall be final and shall not be subject to review except as provided in this article. Such questions of fact shall include ultimate facts and the findings and conclusions of the Commission on reasonableness and discrimination.

grounds, one of which was that basic findings had been omitted. (The case was decided on another point.) The argument made by California in respect to findings was that the lack thereof in the decision of the Federal Power Commission was contrary to the rule laid down by this Court in *Colorado-Wyoming Gas Co. v. Federal Power Comm.* (1945) 324 U.S. 626. It was there held that the federal administrative rule calling for specific findings applied to proceedings before the Federal Power Commission. California's argument was directed towards the failure of the federal agency to provide the findings as prescribed by this Court. Such contention is inapplicable here. The law in California does not demand specificity of findings to the degree required under the federal statutes. (See *Southern Calif. Freight Lines v. Public Util. Comm.* (1950) 35 Cal. 2d 586; *Southern Pacific Co. v. Railroad Comm.* (1939) 13 Cal. 2d 89.)

Under California law, full legislative powers, which are cognate and germane to public utility regulation, have been constitutionally delegated to the appellee Commission. It follows that legislative proceedings which involve public convenience and necessity are not governed by the strict procedural restrictions imposed by Congress upon federal agencies in order to avert unconstitutional delegation of its legislative powers.

**3. Underlying Findings Are Contained in the Decisions Involved.**

In its Decision No. 61261 (Pltfs. Appx. Exh. C) the appellee Commission discussed all aspects of the Rock Springs project at length. In addition to its narrative treatment of the evidence adduced before it, the Commission made specific findings on the advantages and disadvantages of the Gas Companies' proposal. The Commission there held,

". . . the disadvantages outweight the advantages, *unless* applicants can obtain contract revisions or new contracts to eliminate the need for a rate increase, to reduce the period before the project is economically feasible and to maintain a reasonable balance in the two-tiered economy." (Ptn., Appx. Exh. C, p. 6) (Emphasis added.) The Commission further declared in this decision, "In view of the fact that the president of El Paso has expressed willingness to modify the contracts, that the applicants and the City of Los Angeles have recognized that the Commission may properly take this fact into consideration, the Commission finds and concludes that public convenience and necessity require the construction, maintenance and operation of a 24-inch pipeline and related facilities between the California-Nevada border near Ivanpah Valley and Newberry, California subject to the condition that applicants be offered by El Paso Natural Gas Company, revised or new supply contracts (preferably new contracts) that will be more attractive to the California ratepayer than present contracts and acceptable to the applicants and to the Commission, and such revised or new contracts to conform to the requirements of the order herein."

The conditions in the order were restated in Decision No. 62117. (Ptn., Appx., Exh. A, p. 2) which followed hearings on the Gas Companies' "Statement of Compliance with Conditions and Request for Issuance of Supplemental Order Authorizing Construction". This decision also contains an extensive discussion of the economic feasibility of the Rock Springs plan and relates the showing made by the Gas Companies in this regard pertaining specifically to the potential impact of their loss of the Edison load (Ptn., Appx., Exh. A, pp. 7-61). Since Decision No. 62117 found that the applicants had complied with the conditions

of the Order in Decision No. 61261, the construction of the intrastate segment of the pipeline was accordingly authorized.

The practice of predicating the ultimate finding upon a reading of all of the three decisions involved below has been approved by this Court. In *Meeker v. Lehigh Valley R. Co.* (1914) 236 U.S. 412, 427-428, it was said:

> "Another objection which was directed against the orders as well as the reports is that they contain no findings of fact, or, at least, not enough to sustain an award of damages. The arguments advanced to sustain this objection proceed upon the theory that the statute requires that the reports, if not the orders, shall state the evidential rather than the ultimate facts; that is to say, the primary facts from which, through a process of reasoning and inference, the ultimate facts may be determined. We think this is not the right view of the statute, and that what it requires is a finding of the ultimate facts. . . . Upon examining the reports as set forth in the record, we think they contain findings of fact which meet the requirement of the statute, and that the facts stated in the findings if taken as prima facie true, sustain the award of the Commission. True, the findings in the original report are interwoven with other matter, and are not expressed in the terms which courts generally employ in special findings of fact, but there is no difficulty in separating the findings from the other matter, or in fully understanding them, and particularly is this true when the two reports are read together, as they should be. We say 'should be' because both were made in the same proceeding, and the later one affirmatively shows that it was made to supplement and give effect to the original."

The case at bar falls foursquare within the compass of this language. It should be controlled thereby.

**B. CONSOLIDATION OF THE ROCK SPRINGS HEARINGS WITH THOSE OF THE PEMEX PROJECT WAS NOT REQUIRED.**

Appellant presupposes denial of its application for the Pemex project by this Commission. This assumption is premised on the argument that the Rock Springs pipeline and that of Pemex are mutually exclusive and that the authorization of the former dispels any need for the latter. It therefore argues that due process of law requires that applications before administrative agencies involving mutually exclusive proposals be consolidated for hearing and jointly decided. Appellant contends that denial of its petition for writ of review by the California Supreme Court appears to sanction an administrative procedure of pre-judgment of pending applications. In support of appellant's position it cites *Ashbacker Radio Corp. v. Federal Communications Comm.* (1946) 326 U.S. 327. This argument has several defects.

**1. There Is No Showing That the Pemex Project Has Been Prejudged by This Commission.**

Appellant concedes that the evidence received in both of the supposedly mutually exclusive applications might support a conclusion that "the Southern California market may be able to utilize supplies from both the Rock Springs and the Pemex project." (Opr. St., p. 37) If such a showing was manifest even to appellant, it cannot fairly be said that the authorization of one project automatically nullified and prejudged the merits of the second application. This is especially so in view of the fact that both Rock Springs and Pemex must obtain additional authorization from the Federal Power Commission.

There has been no showing whatsoever that the decisions of the appellee Commission inevitably lead to the conclu-

sion which appellant here sponsors. In absence of such demonstration appellant is unable to supply this Court with any rational basis for its argument that the Commission has prejudged its application.

Where an order of an administrative body, exercised with a proper grant of power from the legislature, is assailed, there exists a presumption of validity (*Federal Power Comm. v. Hope Natural Gas Co.* (1944) 320 U.S. 591, 602). One who would seek to have such an order annulled bears a heavy burden of proof, and must specifically set forth facts relied upon to rebut the aforesaid presumption of constitutionality (*Pacific States Box & Basket Co. v. White* (1935), 296 U.S. 176).

Appellant has not met this burden.

**2. The "Ashbacker Doctrine" Does Not Apply to Hearings Conducted by Appellee Commission Under the California Public Utilities Code.**

*Ashbacker Radio Corporation v. Federal Communications Comm.* (1946), 326 U.S. 327, relied upon by appellant, concerned two applications before the FCC for authorization to operate radio transmitters of identical frequency and power output in close proximity to one another. The two stations would have effectively "jammed" each other's transmission. The federal agency, after declaring the applications "actually exclusive" granted one applicant a certificate and set the other application for hearing. This Court reversed the FCC's action and ordered the cases to be consolidated.

It was said in *Ashbacker*, at page 333:

> ". . . We only hold that where two *bona fide* applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him."

That opportunity was written into the FCC's governing statutes which provided that that agency could grant broadcasting licenses without hearing, but could not deny licenses without hearing. In California a different statutory scheme prevails. There is no clear rule enunciated which guarantees a hearing to applicants, or to competitors who do not own *existing* systems which may be "interfered with" by the grant of a certificate. Apparently, applications for certificates of public convenience and necessity may be either granted or denied with or without hearing.[7] The only parties who would be clearly entitled to a hearing under the statute would be utilities which own systems which have been already constructed.[8]

Since the rationale of the *Ashbacker* case is based upon the Congressional mandate to the Federal Communications Commission to afford an applicant a hearing before denial of his application, the rule of that case would not seem to apply under California law to applications to appellee Commission for certificates of public convenience and necessity.

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7. § 1003. The commission may, with or without hearing, issue the certificate as prayed for, or refuse to issue it . . . provided, however, upon timely application for a hearing *by any person entitled to be heard thereat*, the commission, before issuing or refusing to issue the certificate, shall hold a hearing thereupon. (Emphasis added.)

8. § 1001. . . . If any public utility, in constructing or extending its line, plant, or system, interferes or is about to interfere with the operation of the line, plant, or system of any other public utility, *already constructed*, the commission, on complaint of the public utility claiming to be injuriously affected, may, after hearing, make such order and prescribe such terms and conditions for the location of the lines, plants, or systems affected as to it may seem just and reasonable. (Emphasis added.)

**3. The "Ashbacker Doctrine" Does Not Apply to the Facts of This Case.**

The situation which occasioned this appeal is substantially different from that presented in *Ashbacker*. The mutual exclusiveness of applications for authorization to broadcast within a similar area of reception on the identical frequency logically compelled the granting of one and the denial of the other. The present facts do not dictate a like result.

A comparison of the application in the Rock Springs matter with that in Pemex does not indicate that they are actually exclusive. The markets sought by the respective applicants are not identical.

The application of the real parties in interest herein concerning Rock Springs (Application No. 40588) reveals that authority was sought to serve all their retail and wholesale customers in Southern California. The application states:

> *"Conclusion*
>
> "From the foregoing, it is apparent that the combination of the declining California source natural gas supplies and the increased demands for service by *all customers* make it necessary for Applicants to obtain additional out-of-state gas in the near future for *the California gas customers served by Applicants at retail and at wholesale.* (Emphasis added.)

On the other hand, the applications in Pemex indicate that the primary purpose of the construction authorization sought therein was to supply gas to only one customer, appellant. Application No. 42531 states:

> "Applicant seeks herein authorization to construct . . . a . . . natural gas pipeline . . . This new natural gas pipeline system will initially transport natural gas *purchased by Edison* in the State of Texas and in the Republic of Mexico to the following steam electric generating plants owned and operated by *Edison*:" (naming five; emphasis added.)

There was evidence before appellee Commission that the Edison load constituted only 10 per cent of the total market requirements of the real parties in interest herein. Also appellant has admitted that certification of *both* the Rock Springs project and the Pemex project may be warranted (Jur. St. p. 37).

There is a further factual difference here from that in *Ashbacker*. Both applicants have been accorded extensive hearings by appellee Commission. While a certificate was granted to the real parties in interest after such hearing, the application of appellants has not yet been decided.

In view of the foregoing the "Ashbacker Doctrine" is inapposite to this case.

**C. THE CALIFORNIA STATUTORY SCHEME FOR JUDICIAL REVIEW OF DECISIONS OF THE PUBLIC UTILITIES COMMISSION IS NOT VIOLATIVE OF THE DUE PROCESS CLAUSE.**

Appellant asks this Court to strike down three sections of the California Public Utilities Code dealing with the issuance of certificates of public convenience and necessity (Sections 1001 and 1005) and with judicial review of the Commission's actions (Sections 1757 and 1760). Its contention is that the instant case *appears* to construe these statutes as authorizing illegal action by the Commission without review thereof by the California Supreme Court. Foregoing sections of this argument have shown that there was no impropriety in the Commission's decision making procedure. Similarly, review by the California Supreme Court was properly accorded appellant. Its dispute with the review procedure would appear to be derived from the denial of its petition for writ of review without discussion by the Court. Because of this it infers that an independent judgment of the Commission's decisions was not provided. This is not the law.

This Court has held that where a petition for review of a decision of appellee Commission is denied this is tantamount to a decision of the Court that the orders of the Commission did not exceed its authority or violate any right of the petitioner under the Constitution of the United States or of the State of California. ". . . Absence of an opinion by the supreme court did not affect the quality of its decision or detract from its efficacy as a judgment upon the questions presented. . . ." (*Napa Valley Elec. Co. v. Railroad Comm.* (1920) 251 U.S. 366).

Section 1760 of the Public Utilities Code provides that where a decision of the Commission is challenged on constitutional grounds, the California Supreme Court "shall exercise an independent judgment of the law and the facts." Appellant cannot show that the Court did not act in accordance with this statutory directive in denying its petition.

In seeking review by the highest judicial tribunal in California, appellant certainly provided that Court with appellant's view of all "the law and the facts" upon which review might have been predicated had the Court seen fit to do so. Appellant filed an extensive brief in support of its petition and a comprehensive reply to the answers filed therein. Alleged constitutional encroachments were also presented to the California Court. Appellant cannot be heard to say that its claims of error were not considered by the Court. The rule announced in *Ohio Valley Water Co. v. Ben Avon Borough* (1919), 253 U.S. 287 has been complied

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9. § 1760. In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the Constitutional question shall not be final.

with in the review proceedure below; appellan
failed to demonstrate otherwise.

## CONCLUSION

For the foregoing reasons appellee Commis
fully submits that this Court should dismis
appeal from the decision of the Supreme Cour
of California, affirming the decision of this Co

Dated: San Francisco, California
October 19, 1962

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IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1962
No. 445

SOUTHERN CALIFORNIA EDISON COMPANY, a Corporation,

*Appellant,*

*vs.*

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

*Appellee,*

SOUTHERN CALIFORNIA GAS COMPANY and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA,

*Real Parties in Interest.*

## REPLY TO MOTIONS TO DISMISS APPEAL.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962
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SOUTHERN CALIFORNIA EDISON COMPANY, a Corporation,

*Appellant,*

*vs.*

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

*Appellee,*

SOUTHERN CALFORNIA GAS COMPANY and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA,

*Real Parties in Interest.*

## REPLY TO MOTIONS TO DISMISS APPEAL.

It is submitted that the Motions of the adverse parties to dismiss this appeal should be denied, for the grounds advanced in said Motions, and the arguments set forth in the Briefs, supporting said Motions, only serve to emphasize that the pending Appeal presents substantial issues of law and fact, which merit the consideration of your Honorable Court.[1]

[1]The following abbreviations, of parties and certain documents, are sometimes employed herein:

1. Petition for Writ of Review, or, In the Alternative, For A Writ of Mandamus, including exhibits: "Petition"

2. Memorandum of Points and Authorities In Support of Petition For Writ of Review or, In the Alternative, for a Writ

The motions of both of the adverse parties are directed to the importance of the federal questions presented by this Appeal, and also raise certain secondary issues of procedure. Accordingly, we consider each of these matters below, in turn.

## Introduction.

We will devote particular attention to the argument of the respondent Commission, which attempts to meet the issue of whether the California statutes,[2] when construed as vesting the state Public Utilities Commission with the power to arbitrarily grant or deny a certificate of "public convenience and necessity" for public utility construction in a contested case, without regard to any evidence, or any standard of reasonableness, are repugnant to the federal constitutional guaranty of due process of law.

At the outset, we wish to call attention to certain inaccuracies in the Commission's Briefs. Thus, it attempts to describe the position of Edison in the pro-

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of Mandamus, including appendices and verification: "Memorandum"

3. Southern California Edison Company, Appellant: "Edison"

4. Statement As To Jurisdiction, filed by Edison in support of this Appeal: "Statement"

5. The Public Utilities Commission of the State of California, Respondent herein. "Commission"

6. Brief filed herein in support of Commission Motion To Dismiss Appeal: "Comm. Br."

7. Southern California Gas Company and Southern Counties Gas Company of California, Real Parties In Interest, herein: "Gas Companies"

8. Brief filed herein in support of Gas Companies Motion To Dismiss Appeal: "Gas Cos. Br."

[2]California Constitution, article VI, sections 1 and 4; article XII, section 22; State of California, Public Utilities Code, sections 310, 1001, 1005, 1705, 1756 and 1760. These constitutional and statutory provisions are set forth in full in Appendix B of the Statement As To Jurisdiction.

ceedings below as only that of "a customer of the natural gas companies" that applied to the California Commission for a certificate of public convenience and necessity. (Comm. Br. p. 6.) The certificate related to construction of the California portion of a pipeline project that was routed near Rock Springs, Wyoming. This project has often been termed the "Rock Springs Project."

As clearly appears from the record, your Appellant had a *dual* position in the proceedings below, both as a *customer* of the Gas Companies, and also as an *applicant* to the Commission for authorization to implement arrangements for the California portion of a pipeline project designed to transport natural gas from Texas, to Appellant's steam-electric generating plants in California. (Petition for Writ of Review, paras. V, VI and VII; St. as to Juris., pp. 3-4.) As originally planned, the project included a pipeline that would traverse northern Mexico, and which would be operated by Petroleos Mexicanos. Accordingly, the plan was sometimes termed the "Pemex" project. The plan has subsequently been substantially modified, and at the present time it is contemplated that the revised plan will involve the construction of a pipeline, from Texas to California, completely within the limits of the United States of America. Essentially, the fuel procurement problem of Edison and its intention to obtain an independent out of state fuel supply remains unchanged. In view of such revisions the application to the state Public Utilities Commission has been withdrawn, subsequent to the filing of the Notice of Appeal herein, but the issues presented by this matter remain unchanged.

The dual position of Appellant was recognized by the Commission, in its Decision below. (See Decision No. 61261, attached to Petition for Writ of Review, as Exhibit C, at pp. 19, 28-29.) It has also been recognized by the Gas Companies, and on page 9 of the Brief filed herein they state that: "For some time past, and certainly before and during the Commission hearings of the instant cause, appellant has been seeking to get for itself by direct procurement a supply of out of state gas to use as boiler fuel."

The Commission contends at page 8 of the Brief that: It has not been asserted that Edison is injured by the *status quo,* as a customer of the real parties in interest, the Gas Companies. To the contrary, the record clearly shows that it is precisely the maintenance of the *status quo* that injures Edison, for the natural gas service provided by the Gas Companies, under "interruptible" schedules, being unstable, and transient in supply, does not adequately provide for the present and future needs of Edison's electric service customers. This vital factual issue, on the need of Edison for an adequate natural gas supply, was squarely presented to the state Commission in the proceeding below, and was recognized, by the Commission, as an issue material to the decision on certification of the "Rock Springs" project. It is the failure, or refusal, of the Commission to disclose its determination of such issue that is a principal cause for this Appeal. (See St. as to Juris., pp. 2-4, 14-18; Petition for Writ of Review, para. XII.)

At stake in this Appeal, as a matter of fact, is not alone the risk that Edison, and its several million electric service customers will be burdened with an increase in rates, resulting from the construction by a natural gas supplier of an economically unsound pipeline. Equally important is the legal right of Edison to a fair consideration of its plans for an independent pipeline project to carry gas from Texas to California, that would ensure an adequate long-range fuel supply, so Edison would be able to continue to provide satisfactory electric service. (St. as to Juris., p. 5.)

It is submitted that the record shows the factual issues arising from the dual position of Edison in this proceeding are in themselves of sufficient national importance, involving not alone the electric service to a major metropolitan area, but also a major interstate pipeline project, to warrant consideration of this appeal.

Moreover, the arguments of the Commission, on the interpretation of the applicable California statutes as vesting it with unlimited authority to grant or deny applications for certificates of public convenience and necessity, further demonstrate that this Appeal presents substantial federal questions as to the validity of such state statutes, when so construed, under the constitutional guaranty of due process of law. These questions, being of vital concern to all parties interested in the regulation of public utilities, in California, and elsewhere, also warrant the consideration of your Honorable Court, upon this appeal.

## I.

## Statutes Authorizing State Regulatory Agency to Grant or Deny Certificate of Public Convenience or Necessity in Contested Case Without Fair Hearing Are Repugnant to Due Process of Law.

The Commission concedes, in its Brief, that the issue presented to your Honorable Court, for decision, is whether the applicable state statutes[3] are repugnant to the guaranty of due process of law, when they are interpreted as vesting the Commission with the unlimited power to grant or deny a certificate of public convenience and necessity. It argues here, at page 19 of its Brief, as it argued before the State Supreme Court, that under the California Statutes, applications for certificates of public convenience and necessity may be denied, in contested cases, with or without a hearing of the interested parties.[4]

It is submitted that insofar as the state Supreme Court interpreted the applicable statutes to accord with the Commission's argument, such statutes are clearly unconstitutional, for the opportunity to be heard is a fundamental requisite of due process of law. (*Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U. S. 673, 75 L. Ed. 1107, 50 S. Ct. 471 [1930]; *Bratton v. Chandler*, 260 U. S. 110, 43 S. Ct. 43, 67 L. Ed. 157 [1927]; *Granius v. Ordean*, 234 U. S. 385, 394, 58

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[3]Cited in footnote 2, *supra*; and fully set forth in Appendix B of the Statement As To Jurisdiction.

[4]The Commission's argument below, on this point, was described in the Statement at pp. 27-28. It is set forth in the record at pages 27 and 28 of the Answer of respondent Commission to the Petition for Writ of Review etc., filed in the Supreme Court of the State of California.

L. Ed. 1363, 1369; 34 S. Ct. 779 [1913]; *Simon v. Craft*, 182 U. S. 427, 436, 45 L. Ed. 1165, 1170, 21 S. Ct. 836 [1900]; *Louisville and Nashville R. Co. v. Schmidt*, 177 U. S. 230, 236, 44 L. Ed. 747, 750, 20 S. Ct. 630 [1899]).

The requirement of a fair hearing is particularly applicable to the California Public Utilities Commission, which is a special state judicial tribunal. (St. as to Juris. pp. 22-24.) It is settled law that when such administrative body acts judicially, "notice and an opportunity for hearing are indispensable to due process." (*Morgan v. United States*, 298 U. S. 468; 56 S. Ct. 906, 80 L. Ed. 1288 [1936]; *United States v. McCullis*, 200 F. 2d 884, 888 [1st Cir. 1952]; *Magnolia Petroleum Co. v. Carter Oil Co.*, 218 F. 2d 1, 6 [10th Cir. 1954], Cert. den. 349 U. S. 916, 75 S. Ct. 605, 99 L. Ed. 1249 [1955]).[5]

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[5]On other occasions, the California courts have squarely ruled that an application for a certificate, or a license, could not be granted or denied, in a contested case, without a hearing. This rule has not been based on statutory construction, but on the general principles of "the American system of justice", which are expressed in the guaranty of due process of law. (See *Fascination, Inc. v. Hoover*, 39 Cal. 2d 260, 270 (1952); *Carroll v. California Horse Racing Board*, 16 Cal. 2d 164, 168 (1940); *Irvine v. State Board of Equalization*, 40 Cal. App. 2d 280, 284-285 (1940); *State Board of Equalization v. Superior Court*, 5 Cal. App. 2d 374 (1935)). The statutes here involved have also been interpreted by the state Supreme Court, in *Sales v. Railroad Commission*, 15 Cal. 2d 612, 615 (1940), as requiring the respondent Commission to grant interested parties a hearing.

Insofar as the applicable state statutes have been applied in a discriminatory manner, to grant others a hearing, but to deny it to your Appellant, there is a clear violation of the constitutional guaranty of equal protection of the law, and a sound basis for treating these papers as an application for a writ of certiorari. Appellant has prayed your Honorable Court to treat these papers, in the alternative, as an application for such writ, and both the Commission, at page 8, and the Gas Companies, at pages 27 to 30 of their Briefs, concede that in this instance certiorari would be a proper remedy.

### A. Due Process Requires That State Regulatory Agency Issue Findings on Material Issues.

We have discussed above the constitutional requirement that a state regulatory agency grant a fair hearing to the parties interested in applications for certificates of public convenience and necessity, because the bold contention that such hearing is not required by the federal constitution, is the cornerstone of respondent Commission's argument. In this instance, the record shows that the respondent Commission did, in fact, conduct a hearing, but then refused or failed to advise the parties of its determination on the material issues litigated and submitted for decision. (Petition for Writ of Review, parás. XII, XIII and XIV; Statement as to Jurisdiction, pp. 14-17, 26.)

As shown in the Statement as to Jurisdiction, at pages 22 to 36, the issuance of such Findings, upon material issues, and jurisdictional facts, is required by the constitutional guaranty of a fair hearing. The argument of the respondent Commission, to the contrary, is essentially a modification of its basic contention that as it has the unlimited power to grant or deny applications for certificates of public convenience and necessity, arbitrarily, the issuance of Findings is immaterial. Inasmuch as it is the settled law that customers of the Gas Companies, such as Edison, are not captive customers and may lawfully obtain their gas supplies from other sources, disclosure by means of findings as to whether or not the Commission certificated the Rock Springs project in reliance upon the Edison load is a requisite to any determination as to whether the certification was contrary to the record and to the constitutional requirements of procedural due process of law.

1. *Recitation of Statutory Phrase "Public Convenience And Necessity" Not A Finding.*

The Commission argues, at pages 9 to 14 of its Brief, that the recitation of a finding on ". . . public convenience and necessity . . .". is sufficient to satisfy the statutory requirements on a hearing, which include the issuance of findings,[6] and also to satisfy the constitutional requirement of due process of law.

Here again, the Commission miscontrues the record, for it concedes, that such Finding must be supported by "substantial evidence", but asserts that: "Appellant makes no contention that the evidence failed to support the grant of the certificate.". (Comm. Br. p. 11.). The record clearly shows that Appellant has specifically contended, at every stage of the proceedings, that: ". . . the evidence in the case does not support the findings." (Petition for Rehearing by Commission, attached to Petition for Writ of Review as Exhibit E, at pp. 1, 7-10; Petition for Writ of Review, para. XIII.)

Of more importance than such misstatement of the record, however, is that a recitation on "public convenience and necessity" is not in itself a finding of fact, for it is settled that such term is a conclusion, without factual content. This is conceded by the Commission, which states that: "There is no set formula or series of issues which make up public convenience and necessity." (Comm. Br. p. 9, citing, *inter alia*, 2 Davis,

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[6]Public Utilities Code sections 310, 1001, 1005, 1701, 1705 and 1757 specifically provide for a hearing and the issuance of findings, by the state Commission, in contested applications for certificates of public convenience and necessity. The text of these sections is set forth in full in Appendix B of the Statement as to Jurisdiction.

Administrative Law Treatise, 16.11, at p. 471, which suggests that ". . . some findings need not be supported by evidence. . . .)"

In short, the Commission does not seriously contend that the recitation on "public convenience and necessity" should be considered a finding of fact, or that the term is sufficiently definite to be supported by evidence, which could be found by citation of the record. The Commission's argument, essentially, is that a Decision in which it recites the statutory phrase "public convenience and necessity", must necessarily be affirmed, for it may grant or deny certificates in its sole discretion; that is, arbitrarily, without regard to any standards of reasonableness, and without regard to the evidence.

The attempt of the Commission at pages 12 to 14 of its Brief, to justify such arbitrary action on the ground that it is authorized by California law, merely emphasizes that the applicable state statutes and constitutional provisions[7] appear to have been applied, in this instance, in a manner repugnant to the guaranty of due process of law. The Commission argument that the decisions of your Honorable Court, which held that recitation of "public convenience and necessity" is not sufficient to support an administrative order, in the absence of supporting findings of fact, are not based on the constitutional guaranty of due process of law, is patently unsound. (We have discussed the leading cases

[7]Cited in footnote 2, *supra*, and fully set forth in Appendix B of the Statement as to Jurisdiction.

on this subject in our Statement as to Jurisdiction, at pages 29 to 36, and will not repeat the discussion here.)

The Commission suggests, at page 14 of its Brief, that it is attempting to support its action on the theory that it is exercising *legislative*, rather than judicial powers. But it is settled law, and is not disputed by the Commission, that while Commission orders in many instances are legislative-administrative in character, as in fixing rates or issuing certificates, the procedure by which the result is to be reached, the determination of controverted facts between private litigants and disputants, and the decision upon those controverted matters "are strictly judicial." (*Pac. Tel. and Tel. v. Eshleman*, 166 Cal. 630; quoted by Roderick Cassidy, Assistant Chief Counsel for the respondent Commission, in the Foreward to the Public Utilities Code of the State of California, published by the West Publishing Company.) Even the Gas Companies, the real parties in interest to this proceeding, concede that the asserted failure of the Commission to make findings of fact is a ruling "typically of a judicial nature; and is not legislative." (Gas Cos. Br. p. 28.)

Moreover, in the leading decision of *Wichita R. & Light Co. v. Public Util. Comm.*, 260 U. S. 40, 67 L. Ed. 124, 43 S. Ct. 51 (1922), your Honorable Court specifically held, in regard to a state public utilities commission, that when such an agency exercises *legislative* powers, it ". . . must pursue the procedure and rules

enjoined, and show a substantial compliance therewith, to give validity to its action. When, therefore, such an administrative agency is required, as a condition precedent to an order, to make a finding of fact, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective."

That the requirement of findings in *Wichita R. & Light Co.*, was not based on state law, was emphasized by your Honorable Court in *Mahler v. Eby*, 264 U. S. 32, 44 S. Ct. 283, 68 L. Ed. 549, by the statement that the requirement was placed, not only on the language of the state statute, ". . . but also on general principles of constitutional government."

This argument of the Commission merely serves as an admission that it did not issue any Findings, as such, in the proceedings below. We submit, that the state statutes on the power and authority of the Commission,[8] having been interpreted by the state Supreme Court as not requiring Findings on material issues, are clearly invalid, as repugnant to the constitutional guaranty of due process of law.

**B. Due Process Requires Findings on Mutual Exclusivity Prior to Rulings on Application for Certificate.**

In the Statement as to Jurisdiction, we demonstrated, at pages 36 to 44, that in the Decision that is the subject of this appeal, the state Supreme Court appeared to sanction a statutory procedure which would

[8]Cited in footnote 2 *supra*.

permit the California Public Utilities Commission to prejudge pending applications, without a hearing. In this instance the application of Edison, and others, for authorizations to implement the "Pemex" project, which was designed to transport natural gas from Texas to Edison's steam-electric generating plants in California, was pending before the Commission when it issued the Decisions that are the subject of this Appeal.[9]

It is submitted that neither of the Briefs filed by the adverse parties answer this argument. Neither of the adverse parties assert that such prejudgment of pending applications could be justified, and they concede that such prejudgment would violate the constitutional guaranty of due process of law. They limit their argument to the doctrine of "mutual exclusivity", and are forced in each instance, to misstate the record. Thus, the Gas Companies argue, at pages 17 to 22, of their Brief, that a "comparative hearing" before the Commission was not required, by the facts of this case, and under the procedure followed by Edison.[10]

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[9]As stated above, the project has been modified, since the filing of this notice of appeal.

[10]The additional argument of the Gas Companies, on the timely raising of this issue, is patently unsound. Edison could not determine that the Commission would refuse, or fail to find whether or not the two projects, "Rock Springs" and "Pemex" were mutually exclusive, until the Commission had issued Decision No. 62117, which led to this Appeal. (The Decision is set forth as Appendix A to the Petition For Writ of Review, etc.) The constitutional requirement on Findings was promptly raised, by Edison, in a Petition for Rehearing by the Commission. (Exhibit "E" to Petition for Writ of Review). Upon denial of this Petition for Rehearing, Edison promptly submitted the issue to the state Supreme Court. (Petition for Writ of Review, paras. V, VI, VII,

The Commission, at pages 17 to 21, again misconstrues our argument, and describes it as based on the premise that ". . . the Rock Springs pipeline and that of Pemex are mutually exclusive. . . ."

We submit that the record, and our Statement, show unequivocally that your Appellant has not contended that the two pipeline projects would necessarily be mutually exclusive, and does not assert that a "comparative hearing" of the two projects would necessarily be required. The record shows that Edison has consistently contended, before the state Supreme Court, and on the pending Appeal, that under the "Ashbacker doctrine" the guaranty of due process of law requires a *determination* on the issue of mutual exclusivity, when such issue is raised before a special tribunal or administrative body. (St. as to Juris., pp. 41-44.)

The Commission attempts to argue that the *Ashbacker* rule is based on a federal statute, and is not applicable here, because: "In California a different statutory scheme prevails." (Comm. Br. p. 19.) This argument is merely a variation of the basic contention that under the California Statutes[11] the Commission is not required to grant parties interested in certificate applications a fair hearing, nor to issue findings on material issues. Your Honorable Court stated specifically in *Ashbacker, supra,* that determination of the issue of mutual exclusivity is a rule of substance, and squarely stated: "Legal theory is one thing, but the practicalities are different."

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XI, XII, XIII and XIV). The additional federal claim thus made was timely, since it was raised at the first opportunity. (*Cf. Brinkerhoff-Faris Trust and Savings Co. v. Hill,* 281 U. S. 672, 678, 74 L. Ed. 1107, 1112, 50 S. Ct. 471 [1930]).

[11]Cited in footnote 2, *supra.*

## II.

### Due Process of Law Requires Independent Judicial Review of Orders Confiscating Property Rights.

The record shows the important property rights of Edison, as a customer of the Gas Company and also as an applicant for an independent pipeline project, which are involved in this proceeding. (Petition for Writ of Review, paras. XIII and XIV; Statement, pp. 2-3.) As demonstrated in the Statement as to Jurisdiction, at pages 44 to 47, it is settled law, that state statutes which do not provide for an independent review, by a state court, of orders of a regulatory commission or special tribunal, which confiscate property rights, are invalid, under the due process clause of the Fourteenth Amendment.

The adverse parties, in their Briefs, do not contest this settled principle, nor answer Edison's argument. The Commission inaccurately asserts that we "infer" the state Supreme Court did not review the Commission's decisions, because it denied the Petition for Writ of Review, without opinion. (Comm. Br. p. 21.) This, of course, is not the argument advanced in the Statement as to Jurisdiction. As we there demonstrated, the state Supreme Court did not independently review the Decision of the respondent Commission when it rendered the judgment that is the subject of this Appeal for in the absence of *findings* on the material issues, it would not be possible for any tribunal to conduct an independent review, without consideration of the record, which was not before the state court. (St. as to Juris. pp. 44-47.)

The validity of our argument is demonstrated by the concession of the respondent Commission, at pages

9 to 14 of its Brief, that the Decision under review is supported only by the recitation of a finding on "public convenience and necessity." As shown in our Statement as to Jurisdiction, at pages 44 to 47, insofar as the applicable state statutes are construed as authorizing the Commission to grant or deny applications for a certificate by the recitation of such a finding, which is admittedly merely a factual conclusion (*Cf.* Comm. Br. pp. 9-12), they do not provide for an independent judicial review. This, indeed, is one of the basic reasons for requiring special tribunals, or administrative bodies, to make known their determinations on litigated issues. As stated in *SEC v. Chenery Corp.*, 318 U. S. 80, 94, 63 S. Ct. 454, 462, 87 L. Ed. 626, 636 (1943), ". . . the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review."

So here, in the absence of findings setting forth the determinations of the Commission on the material issues it is clear that the state Supreme Court could not perform an independent review of the Decision, and that it denied the Petition for Writ of Review on the ground that the state statutes vested the Commission with absolute discretion to grant or deny applications for certificates, in contested cases. As so interpreted, we submit, the state statutes are repugnant to due process of law.

## III.

## Reply to Secondary Arguments of Adverse Parties.

We have considered above, at some length, the arguments of the respondent Commission, and of the real parties in interest, the Gas Companies, on interpretation of the applicable state statutes on hearings and issuance of findings by the Commission, for the arguments and acts of the Commission on these two matters emphasize its disregard for Edison's substantive rights, and the substantial federal questions that are presented on this Appeal.

We will comment only briefly on the remaining arguments of the adverse parties, which relate essentially to interpretation of the record, and matters of procedure.

### A. Argument That Commission Issued Findings on Material Issues in Narrative Form.

Both the Commission and the Gas Companies contend that although not required to do so by law, the Commission nonetheless did in fact issue findings in the proceedings below, and that such findings are set forth in narrative form in the three Commission opinions, when these are read together. (Comm. Br. pp. 14-16; Gas Co. Br. pp. 12-16.)

As the three opinions in question are before your Honorable Court as Appendices A, B and C to the Petition For Writ of Review, there can be no factual question as to the presence, or absence, of the required findings. That the Commission failed or refused to

make such findings was clearly shown in our Statement as to Jurisdiction, at pages 14 to 20, 26, and 34-35. As the argument of the adverse parties does not overcome the analysis there set forth, we refer to the Statement, which we submit has not been refuted.

**B. Standing to Appeal and Ripeness for Decision.**

The argument of the Commission, on pages 6 to 8 of its brief, on Standing, is based essentially on a distortion or misunderstanding of the record. The Commission cites the Statement as to Jurisdiction to support its characterization of Edison's position in the proceeding below as that of a customer of the real parties in interest, the Gas Companies. But as shown at the beginning of this Reply, in the Statement As To Jurisdiction, we clearly cited the uncontroverted portions of the Record which show that Edison occupied a *dual* position in the proceedings below, both as a customer of the real parties in interest, the Gas Companies; and also as an applicant to the Commission for authorization to implement arrangements for an independent interstate pipeline project. (See Petition for Writ of Review, etc., paras. V, VI and VII.)

The argument of the Commission is not applicable to the facts of this case, for Edison's position here is comparable to that considered by your Honorable Court in *Frost v. Corporation Commission,* 278 U. S. 515, 49 S. Ct. 235, 73 L. Ed. 483, where the contention as to Standing was resolved in favor of the Appellant. Here, as in *Frost,* the application of the state statutes

by the regulatory Commission and the state Supreme Court has directly affected the property and property rights of the appellant, in this instance, Edison. The standing of Edison to raise the issue of the validity of such state statutes on appeal to this Court is clearly within the rule set down by your Honorable Court in the leading decisions of *Allied Stores Inc. v. Bowers*, 358 U. S. 522, 3 L. Ed. 2d 1, 79 S. Ct. 437 (1959); and *Pierce v. Society of Sisters*, 268 U. S. 510, 69 L. Ed. 1070, 45 S. Ct. 571 (1925); that a party whose legal right has been invaded by unwarranted state action has the standing to challenge such action as being repugnant to the protection guaranteed by the federal Constitution.

The Commission's argument on Standing also appears to embrace, inferentially, the question of "ripeness", for on page 8 of its Brief it asserts that for Edison to profess injury is at best anticipatory. The references of the Commission to the pending litigation on the validity of the merger between the El Paso Natural Gas Company and the Pacific Northwest Pipeline Company, suppliers of natural gas to the Rock Springs Project, and to proceedings before the Federal Power Commission, further illustrate, as set forth in the Statement as to Jurisdiction, the important relationship of this case to other proceedings, and the vital issues of fact presented by this Appeal. (St. as to Juris. pp. 47-50.)

As shown in the Statement As To Jurisdiction, the decision of the California Supreme Court, without opinion, is a final judicial determination of the validity of the Order of the California Commission. (Statement, pp. 20 to 21.) This appeal is the proper method of obtaining a review of this adjudication, and if it were dismissed, on the present state of the record, Edison would be deprived of all judicial review of what appears to be a purely arbitrary action on the part of the California Commission, and would suffer the injuries consequent thereon.

It is submitted that Edison not only has "Standing" to prosecute this appeal, but that the matter is now "ripe" for decision by your Honorable Court.

**C. State Court Judgment Reviewable by Appeal or Certiorari.**

Another subsidiary issue, raised in the Gas Companies motion to dismiss, is that the questions raised by this appeal are only reviewable by certiorari. (Gas. Cos. Br. pp. 27-30.)

This argument is based on the bald, unfounded assertion that this Appeal does not concern the "certification order" of the respondent Commission, but intermediate, procedural rulings. Such argument is an obvious distortion of Edison's position, which is that the certification order is invalid, for as it is not supported by the Findings required by the constitutional guaranty of due process, it was issued without a fair hear-

ing, and was not the subject of an independent review of a state court.

The Gas Companies concede that if the certification order of the Commission is deemed to be a legislative act, and was issued without the findings required by statute, issuance of a writ of certiorari would be proper, under the rule of *Atchison etc. Ry. Co. v. Public Utilities Commission*, 346 U. S. 346, 348, 74 S. Ct. 92, 98 L. Ed. 51. Edison has already recognized that certain elements of this matter might indicate review upon certiorari would be the preferable remedy, and has prayed your Honorable Court, as an alternative to the Appeal procedure, to consider these papers as a petition for such writ. (Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States (1951 Ed.) pp. 43-49; Statement as to Jurisdiction, p. 51.)

The respondent Commission also recognizes the possibility that certiorari may be applicable in this instance, and has requested permission to file a more extensive answer in the event your Honorable Court so treates these papers. (Comm. Br. pp. 2-3.)

It is evident that this matter is within the jurisdiction of your Honorable Court, either upon appeal or upon certiorari, and the Gas Companies motion to dismiss, upon that ground, is poorly founded. Indeed, in the very cases cited by the Gas Companies, your Honorable Court denied the motion to dismiss, and treated the appeal as a petition for writ of certiorari. (*Atchi-*

*son etc. Ry. Co. v. Public Utilities Comm., supra; Alabama and Vicksburg Ry. Co. v. Journey*, 257 U. S. 111, 42 S. Ct. 6, 66 L. Ed. 254 (1921).)

**D. State Court Judgment Did Not Rest Upon Non-Federal Basis.**

The Gas Companies also assert, on pages 24-27 of their Brief, and at footnote 14, on page 32, that the state court judgment was, or could have been, based on independent state grounds. Significantly, this assertion is not set forth by the Commission.

It is evident, that the state court judgment was necessarily based upon the federal questions presented in the Petition for Writ of Review, for as the allegations therein were not traversed, nor denied, by Answer or otherwise, they were deemed admitted. (Witkin, Bernard E., California Procedure, vol. 3, pp. 2549 and 2553.) And it is settled that in determining the legal effect of the facts so alleged, as a deprivation of appellant's legal rights under the XIVth Amendment, the Supreme Court of the United States is at as full liberty to consider them as was the state Supreme Court. (*Truax v. Corrigan*, 257 U. S. 312, 324, 42 S. Ct. 124, 66 L. Ed. 254, 259; Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States (1951 Ed.), at pp. 204-205; Statement as to Jurisdiction, pp. 17-21.)

## IV.

## Motion to Correct Title and Caption of Case Should Be Denied.

There is also pending before this court a motion of the Gas Companies, the real parties in interest, to correct the title and caption of the case, so that they would appear as appellees herein. This motion, dated October 12, 1962, is made in part on the ground that the Gas Companies are parties in the cause adverse to your appellant, and are therefore entitled to be treated as, and to have all the rights and privileges of, appellees. It is an evident fact that the Gas Companies and the appellant are, and from the beginning of the certification proceeding have been, adversary to each other. However, as is indicated by the motion and brief filed by the Public Utilities Commission, it is not accurate to state that in California practice the respondent Commission is only a "nominal party". On the contrary, as shown by the motion to dismiss, and the supporting brief filed by the Public Utilities Commission of the State of California, the Commission appears as an actual respondent in this proceeding and vigorously defends its orders and decisions. As the Public Utilities Commission is the proper party respondent in this action, the role of the Gas Companies is accurately and literally described as "real parties in interest".

We have discussed, above, such contentions of the Gas Companies, in their brief in support of the motion to dismiss, as appear relevant. As parties to this proceeding, whether as appellees, or real parties in interest, they may have the right to be heard by your Honorable Court. However, it is submitted that the

proper appellee herein is the Public Utilities Commission and that the title and caption of the case need not be altered.

## Conclusion.

It is submitted that the briefs filed by the respondent Commission and the Gas Companies, real parties in interest, emphasize the significance of the questions of fact and law posed by the present appeal, which involves the rights of the several million people that utilize the electric service offered by your appellant, Edison, and a judgment that could establish a precedent on the arbitrary exercise of power by state regulatory agencies. It is clear, from the decisions of the Commission, that the property and property rights of your appellant, Edison, are in jeopardy, and that it has standing to prosecute this appeal. The relationship of this appeal to proceedings before the federal courts, the federal power commission, and the state public utilities commission itself, further emphasize that this matter is now "ripe" for consideration.

The motions to dismiss should be denied.

Dated: December 1, 1962

Respectfully submitted,

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# In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 445

SOUTHERN CALIFORNIA EDISON COMPANY, a corporation,
*Appellant,*

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
*Appellee,*

SOUTHERN CALIFORNIA GAS COMPANY and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA,
*Real Parties in Interest.*

On Appeal from the Supreme Court of the State of California

## Supplement to Motion to Dismiss Appeal

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*Real Parties in Interest.*

On Appeal from the Supreme Court of the State of California

## Supplement to Motion to Dismiss Appeal

The Public Utilities Commission of the State of California, appearing herein as appellee, hereby joins in and adopts the "Supplement to Motion of Southern California Gas Company and Southern Counties Gas Company of California to Dismiss Appeal; or Alternatively, Suggestion of Mootness," filed in the within proceeding by South-

ern California Gas Company and Southern Counties Gas Company of California, real parties in interest herein.

Dated: San Francisco, California
December 3, 1962

Respectfully submitted,

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*Real Parties in Interest.*

## REPLY TO SUPPLEMENTS TO MOTIONS TO DISMISS APPEAL.

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*Appellee,*

SOUTHERN CALFORNIA GAS COMPANY and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA,

*Real Parties in Interest.*

## REPLY TO SUPPLEMENTS TO MOTIONS TO DISMISS APPEAL.

Your Appellant, the Southern California Edison Company herewith submits a reply to the Supplements to Motion To Dismiss Appeal, dated December 3, 1962, and filed by the real parties in interest, the Southern California Gas Company and Southern Counties Gas Company of California; and by the appellee, the Public Utilities Commission of the State of California.[1]

[1]The following abbreviations, of parties and certain documents, are sometimes employed herein:

Although the supplement of the Gas Companies is entitled a "Supplement to Motion Of Southern California Gas Company and Southern Counties Gas Company of California to Dismiss Appeal, or Alternatively, Suggestion of Mootness", it is clear that the Supplement is directed only to the issue of mootness, for in paragraphs 1 and 2 thereof the Gas Companies state that they move as a supplement and addition to the motion to dismiss appeal, to "dismiss the appeal herein on the ground that it has become and is, and the questions raised herein have become and are, moot". (Gas Cos. Supplement, p. 1.) It appears that this suggestion of mootness has been adopted by the appellee, the

(1) Petition for Writ of Review, or, In the Alternative, for a Writ of Mandamus, including exhibits: "Petition."

(2) Memorandum of Points and Authorities in Support of Petition for Writ of Review or, in the Alternative, for a Writ of Mandamus, including appendices and verification: "Memorandum."

(3) Southern California Edison Company, Appellant: "Edison."

(4) Statement as to Jurisdiction, filed by Edison in support of this Appeal: "Statement."

(5) Reply to Motions to Dismiss Appeal, filed herein by Edison: "Edison Reply."

(6) Reply to Supplements to Motion to Dismiss Appeal, filed by Edison: "Edison Reply to Supplements."

(7) The Public Utilities Commission of the State of California, Respondent herein: "Commission."

(8) Brief filed herein in support of Commission Motion to Dismiss Appeal: "Comm. Br."

(9) Supplement to Motion to Dismiss Appeal, filed herein by the Commission: "Comm. Supp."

(10) Southern California Gas Company and Southern Counties Gas Company of California, Real Parties in Interest, herein: "Gas Companies."

(11) Brief filed herein in support of Gas Companies' Motion to Dismiss Appeal: "Gas Cos. Br."

(12) Supplement to Motion of Southern California Gas Company and Southern Counties Gas Company of California to Dismiss, or Alternatively Suggestion of Mootness: "Gas Cos. Supp."

Public Utilities Commission, in a Supplement dated December 3, 1962, which has also been filed herein.[2]

It is submitted that the suggestion of "mootness" is poorly taken, for the subject matter of this appeal, which relates to the construction placed upon certain state statutes by the Public Utilities Commission, and the state Supreme Court, in proceedings on the application of the real parties in interest, the Gas Companies, for a certificate to construct the California segment of an interstate pipeline project. (Rock Springs)[3] is fully intact, and has not been changed since the filing of this Appeal.

The suggestion of mootness raised by the adverse parties[4] in their Supplements, is based exclusively on the circumstance that subsequent to the filing of this Appeal, an independent pipeline project ("Pemex") which also involved Edison, has been substantially re-

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[2]We observe that the real parties in interest, the Southern California Gas Company and the Southern Counties Gas Company of California, have not, as yet, been admitted as parties to this action, and it can not be determined whether their Motion, or their Supplement, will be considered at this time. Accordingly, the effect of the purported adoption by the Appellee, the Public Utilities Commission of the State of California, of the Supplement of said real parties in interest, can not be determined at this time.

However, as stated in the Edison Reply to Motion to Dismiss Appeal, it is an evident fact that the real parties in interest, the Gas Companies, and your appellant, Edison, are adverse parties in the certification proceeding that is the subject of this appeal, and as such adverse parties the Gas Companies may have the right to be heard by your Honorable Court. (Edison Reply, p. 23.) Therefore, this Reply to the Supplement of the Gas Companies is being filed at this time, to clarify the suggestion of "mootness" raised therein, so that the matter will be placed in proper perspective.

[3]See Statement as to Jurisdiction, pp. 5-9.

[4]That is, both the real parties in interest, the Southern California Gas Company, and the Southern Counties Gas Company of California; and the appellee, the Public Utilities Commission of the State of California.

vised, and an application to the state Public Utilities Commission for authorization to implement such project, has been withdrawn. (Edison Reply, p. 3; Document "3" in App. to Gas Cos. Supplement.) We submit, that this procedural modification of the independent pipeline project does not affect the subject matter of this Appeal, which is concerned only with the certification of the "Rock Springs" pipeline project, that is being prosecuted by the Gas Companies.

In point of fact, as we will show below, the pending revision of the independent pipeline project serves only to increase the importance of the issue of the economic feasibility of the Gas Companies' "Rock Springs" project. This in turn casts still greater doubt on the validity of the certificate granted the Gas Companies by the appellee, Public Utilities Commission. As a consequence of these developments, the factual issues presented by this appeal have become even more important than before, and there is even greater justification for plenary consideration of this matter by your Honorable Court.

## I.

## Subject Matter of Appeal Remains Intact.

The subject matter of this Appeal has been clearly described in the Statement As To Jurisdiction, at pages 5 to 9, but for purposes of reference, we will briefly summarize such subject matter, below.

### A. Restatement of Case.

This appeal is taken from a judgment of the California Supreme Court, affirming Decisions of the state Public Utilities Commission, granting certificates of

public convenience and necessity to the real parties in interest herein, the Gas Companies, for the construction and operation of the California segment of an interstate natural gas project, which would be routed near Rock Springs, Wyoming, and is therefore sometimes described as the "Rock Springs" project.

Your appellant, Edison, appeared in the proceedings below, and informed the Commission that to obtain an adequate long-range fuel supply, so as to be able to continue to provide satisfactory electric service, it was attempting to obtain an independent supply of natural gas from sources outside California, and that in the future the two Gas Companies might not continue to supply Edison with natural gas service, as in the past. Edison, and other parties, questioned whether the proposed "Rock Springs" project would be "economically feasible" without the Edison load. During the pendency of the proceedings on "Rock Springs", applications were filed with the state Commission, by Edison and another party, for authorizations that would be required to implement a proposed independent pipeline project, that would be routed from Texas, through northern Mexico, to California. As the Mexican portion of the project was to be owned and operated by Petroleos Mexicanos, the project was sometimes termed the "Pemex Project." (Statement, p. 5.)

In the Decisions granting the certificate to the Gas Companies, on the California segment of the "Rock Springs" project, the Commission did not make any findings on the principal issue of economic feasibility, nor on the inclusion or exclusion of Edison in the market relied upon for certification of the Rock Springs project, nor on other principal issues litigated

in the proceeding, and necessary to its determination. (Statement, pp. 5-6.)

The questions presented by this Appeal are whether the provisions of the statutes and the Constitution of the State of California, as applied by the Supreme Court of that state, in affirming the Decisions of the Commission on the grant of a certificate to the Gas Companies for the "Rock Springs" project, are repugnant to the requirements of due process of law provided in Article XIV, section 1, of the Amendments to the Constitution of the United States of America. (Statement, pp. 8-9.)

The decisive fact, insofar as the suggestion of "mootness" is concerned, is that the certificate granted by the state Commission for the "Rock Springs" project is still outstanding. If this certificate had been revoked by the appellee Commission, or cancelled by the Gas Companies, it is possible that the issue of "mootness" might then arise. But as long as the "Rock Springs" certificate continues to be outstanding, the subject matter of this appeal, and the legal issues presented thereby, remain in existence, for there is a direct controversy between your appellant, Edison, and the appellee, the state Commission, and the real parties in interest, the Gas Companies, on the validity of this certificate.

It is clear that the revision of the independent pipeline project, sometimes termed "Pemex", in which Edison is involved, has not affected the subject matter of this appeal, on the certificate granted the "Rock Springs" project, but has only increased its importance, as we will show below.

**B. Revision of Independent Pipeline Project With Which Edison Concerned.**

As stated in the Edison Reply, filed herein, at page 3, the original plan for the independent pipeline project has been substantially modified, and at the present time it is contemplated that the revised plan will involve the construction of a pipeline, from Texas to California, that will be completely within the limits of the United States of America.[5] In view of such revisions, the application to the state Public Utilities Commission on implementation of the independent pipeline project has been withdrawn, but the fuel procurement problem of Edison and its intention to obtain an independent out of state fuel supply remain unchanged.

The text of notice of the withdrawal by Edison of the application to the state Commission for authorization to participate in the proposed "Pemex Project" has been filed with this Court by the Gas Companies. This notice clearly states: "The project covered by these applications is now in the process of revision, which revisions are expected to be completed shortly. Such revisions include matters such as gas supply, route of the pipeline, facilities and costs and contemplate possible service to the Department of Water and Power of the City of Los Angeles as well as to Edison. Since these revisions are of a substantial and far-reaching nature, there appears to be no purpose in continuing the processing of the above applications." (Gas Cos. Supplement, Document "3", App. p. 4.)

Thus, as stated in the Notice itself, the withdrawal of the application for authorization to participate in the

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[5]As the revised pipeline project will not traverse Mexico, and will not be operated, in any part, by Petroleos Mexicanos, the term "Pemex Project" has become inappropriate.

"Pemex Project" does not indicate an abandonment of the Edison plan to obtain an independent supply of natural gas from sources outside California. This plan, which the Commission itself recognized, in the proceedings below, as envisaging the: "... direct purchase of gas from fields located in the Gulf Coast Area and its transmission by the Tennessee Gas Transmission Company", remains essentially unchanged, the revisions being designed, *inter alia*, to reduce the purchase price of the gas and the cost of transportation, and to increase the market for said gas.

The Gas Companies themselves have conceded that the Edison plan to obtain an independent supply of natural gas from sources outside California, represents an objective that has been under development for several years, the plan itself being changed, from time to time, to adjust to changed circumstances. They have stated, in the Brief filed herein, that: "For some time past, and certainly before and during the Commission hearings of the instant cause, appellant (Edison) has been seeking to get for itself by direct procurement a supply of out-of-state gas to use as boiler fuel" (Gas Co. Br. p. 9.)

It is clear, we submit, that the revision of the independent pipeline project, in which Edison is involved, *does not affect the subject matter of this* appeal, which involves a completely different project, termed "Rock Springs", which is being prosecuted by the real parties in interest, the Gas Companies. Moreover, the pending

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[1] See discussion of "Other Gas Supplies," in Decision No. 61201, set forth on page 18 of Exhibit "C" to Petition for Writ of Review, or, in the Alternative, for a Writ of Mandamus, which is part of the Record before this Court.

revision does not affect any of the factors involved in the issue of "economic feasibility", as presented to the Commission in the proceedings below, but only adds a new factor, not heretofore considered: The impact upon the "Rock Springs" project of the possible loss of the City of Los Angeles Department of Water and Power, the Gas Companies second-largest "interruptible customer".

1. *Economic Feasibility of Rock Springs Project.*

The record clearly shows that Edison has a *dual* interest in a proper determination by the state Commission, on the "economic feasibility" of the "Rock Springs" project, for it is both a customer of the Gas Companies, and is involved in a project for an independent interstate pipeline. (Statement, pp. 3-4, pp. 47-50; Edison Reply, pp. 2-5.)

As a customer of the Gas Companies, your appellant, Edison, is concerned with the prospect that the "Rock Springs" project, if consummated, will result in higher rates for the natural gas service offered by the Gas Companies. The several factors that could cause such higher rates were set forth by the state Commission, in the "Summary As To Economic Feasibility" on pages 34 and 35 of Decision No. 61261, which is before this Court as Exhibit "C" to the Petition For Writ of Review, etc. filed with the state Supreme Court. The Commission there concluded that, as then constituted, from the short term the "project does not appear economically feasible", for several factors, that did *not* involve the loss of the Edison load. It further concluded that from the long-range standpoint "the project appears economically feasible", but it recognized that this possibility was based on the assumption of continued

service to large interruptible customers, including Edison, and that: ". . . if many of the larger customers bring in their own gas supplies, this assumption may be wrong." As the Commission staff pointed out, the Gas Companies had included, in their annual total-use forecast, employed in their showing on economic feasibility, the ". . . full gas requirements of all interruptible customers", although three of the largest of these customers had given notice that they would not permit automatic annual renewal of their contracts."

The record shows that these three customers were your appellant, Edison, the Department of Water and Power of the City of Los Angeles, and the California Electric Power Company.[7]

As stated in the Edison notice of withdrawal of the application for authorization to participate in the "Pemex" project, brought before this Court by the Gas Companies, and the Commission, the revised project now contemplates "possible service to the Department of Water and Power of the City of Los Angeles as well as to Edison."[8]

The economic impact of the loss of the Department of Water and Power market, in addition to the loss of the Edison market, upon the "economic feasibility"

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[7]See Document "3" in the Appendix to the Gas Cos. Supplement; apparently adopted by appellee Commission.

[8]Testimony on this matter was presented to the state commission in the hearing below on the "Rock Springs" application by a witness for the Gas Companies, Mr. Walter Herrman. Extracts from transcripts of the proceedings before the state Commission on February 19, 1960 and February 17, 1961 are attached as Appendices 1 and 2 hereto. The testimony on the three large interruptible customers is set forth in Appendix 2, where the witness stated: "The three customers were Edison, Department of Water and Power, California Electric Power, and California Portland Cement and Riverside Cement."

of the "Rock Springs" project is indicated by the fact that the Department itself has consumed, and is expected to consume, in the next four years, quantities of natural gas that will approach, is magnitude, the quantity that will be consumed by Edison.*

As shown in the Statement as to Jurisdiction, at pages 38 to 40, the Federal Power Commission has recognized the necessity for findings on, and determination of the issue of, economic feasibility of the "Rock Springs" project without the Edison load. The necessity for such findings by the California Public Utilities Commission is equally essential, and has become more acute since the filing of this appeal, by the possibility that the Department of Water and Power load will not be served by the Gas Companies, so that the "Rock Springs" project will represent a costly, and unnecessary, natural gas supply.

It is submitted that the proposed revision of the independent interstate pipeline project, with which Edison is involved, does not resolve the controversy on the "economic feasibility" of the "Rock Springs" project, but on the contrary causes such controversy to become more acute.

## II.

## Reply to Argument of Gas Companies on Mootness.

We have attempted to set forth above, a brief summary of the factual consequences of the proposed revision of the independent interstate pipeline project, for we believed these facts would be useful in placing the suggestion of mootness in proper perspective.

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*Figures on the projected fuel requirements of Edison, and the Department of Water and Power, as presented to the Commission in the proceedings below, are set forth in Appendices 1 and 2 hereto.

It is fundamental that: "In determining whether a cause is moot the test is whether, at all stages of the litigation, there is an 'actual controversy, and adverse interests' capable of being acted upon by a judgment which can be carried into effect." (Robinson and Kirkham, Jurisdiction of the Supreme Court of the United States, [1956], p. 494.)

It is submitted that we have shown above that the pending revision of the independent project, and the withdrawal of the Edison application to the state Commission, do not affect the subject matter of this Appeal, which concerns the certification of a different pipeline project, which is being prosecuted by the Gas Companies, the real parties in interest.

It is clear, we submit, that there is an actual controversy between your appellant Edison, and the appellee Commission, and the real parties in interest, the Gas Companies, on the validity of the certificate granted for construction of the California segment of the proposed "Rock Springs" project. It is equally clear that the granting of the certificate affected Edison's property, and property rights, both as a customer of the Gas Companies, and as a party interested in an independent interstate pipeline project. (St. as to Juris. pp. 3-4; Edison Reply, p. 3.) Accordingly, so long as the certificate granted by the California Commission for construction of the California segment of the "Rock Springs" project remains outstanding, there are adverse interests capable of being acted upon by a judgment of your Honorable Court. It is settled law, that when valuable rights are claimed by one party, and denied by the other, a case is not moot. (*Security Mut. Life Ins. Co. v. Prewitt*, 200 U. S. 446, 26 S. Ct. 314, 50

L. ed. 545; 9 Id., 202 U. S. 246, 247-248, 26 S. Ct. 619, 50 L. Ed. 1013; *Board of Flour Inspectors of New Orleans v. Glover*, 160 U. S. 170, 16 S. Ct. 321, 40 L. Ed. 382; Id., 161 U. S. 101, 103, 16 S. Ct. 492, 40 L. Ed. 632; *Puget Sound Power and L. Co. v. The City of Seattle*, 271 Fed. 958; 1 Corpus Juris Secundum, p. 1017.)

Essentially, the supplemental motion of the real parties in interest, the Gas Companies, is based on a misunderstanding or a distortion of the issues raised in this Appeal. Thus, they assert that the two questions raised by the Appeal are the refusal of the Commission to consolidate the hearings on the "Rock Springs" and the "Pemex" applications, and the question of the unconstitutional prejudgment of the "Pemex" Application. (Gas Cos. Supp. Motion, p. 3.) But it is clear, as stated in the Edison Reply to Motion to Dismiss, that the question presented in this Appeal, in regard to the independent pipeline project, whether it is routed through Mexico, as in "Pemex", or elsewhere, is whether the guaranty of due process of law requires a determination, or finding, on the issue of mutual exclusivity, when such issue is raised before a special tribunal or administrative agency. (St. as to Juris., pp. 41-44, citing *Ashbacker v. Federal Communications Commission*, 326 U. S. 327; 66 S. Ct. 148; 90 L. Ed., 108.) And such issue of mutual exclusivity remains extant, for as stated in the Notice filed by Edison with appellee Commission, the independent pipeline project is now in the process of revision.

A careful reading of the Gas Companies Supplement to Motions To Dismiss Appeal shows that it is directed to only one, or possibly two of the questions raised

herein. (Compare Statement As to Jurisdiction, pp. 8-9.) As the Gas Companies motion is not directed to all of the issues involved they thus tacitly admit that even upon their own analysis of the case other questions remain upon this appeal to be decided by the court.

Moreover, the Commission itself, in the Briefs filed herein, recognizes that a primary issue presented here arises from the position of Edison as a present customer of the Gas Companies. (Comm. Br. p. 6.) The Commission also specifically recognizes the continued interest of Edison in procurement of natural gas from a source other than the real parties in interest herein. (Comm. Br. pp. 7-8.)

Under the factual situation here presented, the suggestion of mootness, we submit, is not applicable. Accordingly, we will not prolong this Reply by a detailed analysis of the decisions cited by the Gas Companies, in their Supplement. Upon examination it will be found that such decisions concerned matters where the subject matter of the appeal had ceased to exist, a factual situation completely different from that now presented to your Honorable Court. For purposes of reference, only, an analysis of these decisions is set forth in the footnote, below.[16] Moreover, as shown in

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[16] As stated above, upon examination, it will be found that each of the Decisions cited by the Gas Companies in the Supplemental Motion relate to matters where the subject matter of the appeal had itself ceased to exist:

(1) *Kimball v. Kimball*, 174 U. S. 158; 19 S. Ct. 639; 43 L. Ed. 174, the letters of administration, that were the subject of the Appeal, had been revoked.

(2) *United States of America v. Alaska Steamship Co.*, 253 U. S. 113; 40 S. Ct. 448; 64 L. Ed. 808; the forms of the bills of lading, presented for review, were modified by statute, prior to hearing of the appeal.

(3) *Heitmuller v. Stokes*, 256 U. S. 359; 41 S. Ct. 522; 65

the Statement As To Jurisdiction, at pp. 47-52, the issues of fact and law presented by this appeal involve matters of great public interest, both to the several million persons served by Edison, and also to other parties subject to the California statutes on proceedings of the state Public Utilities Commission. The factor of public interest is extremely pertinent when the suggestion of mootness is raised in regard to decisions of a major administrative body, such as the Public Utilities Commission of the State of California.[11] This is an additional ground for plenary consideration of this Appeal, and a decision on the merits.

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L. Ed. 990; the appellee sold and conveyed the interest in real property that was the subject of the appeal.

(4) *Kowal Cadillac Service v. Interstate Commerce Commission*, 317 U. S. 595; 63 S. Ct. 158; 87 L. Ed. 487, the application for the certificate was denied, pending appeal. (Similarly, as suggested above, the question of mootness might arise here, if the certificate issued the real parties in interest, the Gas Companies, had been revoked or cancelled.)

(5) *Amalgated Association v. Wisconsin Employment Relations Board*, 340 U. S. 416-418, 95 L. Ed. 389; 71 S. Ct. 373 (1950), the arbitration award which was the subject of the appeal was superseded by agreement and terminated.

(6) *Dorchius v. Board of Education*, 342 U. S. 429, 433, 72 S. Ct. 94, 96 L. Ed. 475 (1951), the rights of a student, the subject of the appeal, were terminated by graduation.

(7) *Alton v. Alton*, 347 U. S. 610, 74 S. Ct. 736, 98 L. Ed. 987 (1954), the right of petitioner to maintain a divorce proceeding in the Virgin Islands was deemed moot by reason of entry of a valid decree of divorce in an action, in which appellant had appeared, in the State of Connecticut.

(8) *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448, 77 S. Ct. 912, 1 L. Ed. 972 (1957), the respondent employer ceased all of its operations, and appeal deemed moot.

(9) *St. Pierre v. United States*, 319 U. S. 41, 63 S. Ct. 769, 87 L. Ed. 1190 (1943), appellant completed service of prison term prior to issuance of Writ of Certiorari, so matter deemed moot.

(10) *Ford Motor Company v. National Labor Relations Board*, 305 U. S. 364, 59 S. Ct. 301, 83 L. Ed. 221 (1939): Matter remanded by trial court to respondent board for purpose of setting aside findings and order and issuing proposed findings and making decision and order upon reconsideration of the entire case; so question deemed academic.

[11] See note, 53 Harvard Law Review 628 (1940).

## Conclusion.

In the event that we have erred, in our analysis of this matter, we request, that in any judgment of dismissal your Honorable Court follow the established practice and vacate the judgment below, in the state Supreme Court, and remand this case for further proceedings.[12] We submit however that on the facts here presented, this Appeal merits the plenary consideration of your Honorable Court, and the motions of the adverse parties, to dismiss, should be denied.

Dated: December 18, 1962.

Respectfully submitted,

ROLLIN E. WOODBURY,
HARRY W. STURGES, JR.,
WILLIAM E. MARX,

TRIPPET, YOAKUM & BALLANTYNE,
By OSCAR A. TRIPPET, and
THOMAS H. CARVER,
*Attorneys for Appellant, Southern California Edison Company.*

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[12] *National Milk Producers v. San Francisco*, 317 U. S. 423, 65 S. Ct. 359, 87 L. Ed. 375; *Dyer v. City Council of Belon*, 333 U. S. 825, 68 S. Ct. 450, 92 L. Ed. 1111; Stern and Gressman, Supreme Court Practice (1954) p. 366; Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States (1956) p. 501.

## APPENDIX.

Extracts from transcript of proceedings before the Public Utilities Commission of the State of California in the matter of the joint applications of Southern California Gas Company and Southern Counties Gas Company of California for a certificate of public convenience and necessity under Section 1001 of the Public Utilities Code. Application No. 40588 (Amended).

## Appendix 1.

Appendix 1: Extracts from testimony offered February 19, 1960 being pages 2336 and 2337 of the transcript.

"Q. Can you give us the percentage of total fuel use since the initiation of the G-54 Schedule as between gas and oil by the Department of Water and Power?

A. Yes. G-54 Schedule I believe went into effect in July of 1957. For the six months of the 1957 year beginning in July our fuel requirements were met by burning 74.4 percent gas and 25.6 percent oil. For the calendar year 1958 we burned 76.9 percent gas and 23.1 percent oil.

For the calendar year 1959 we burned 66.5 percent gas and 33.5 percent oil.

Q. Now, can you give the Commission any estimate of the Department's future requirements, total fuel requirements, for the next 10 years?

A. Yes, I have tabulated here the estimated gross fuel requirements for the Department's power system for 1960 through 1969. Do you want me to give you those figures?

Q. Please.

A. They are expressed in Mcf gas.

1960, 64,814,000.
1961, 68,399,000.
1962, 72,576,000.
1963, 83,958,000.
1964, 91,737,000.
1965, 93,254,000.
1966, 90,863,000.
1967, 96,126,000.
1968, 105,610,000.
And 1969, 114,495,000.

Mr. Driscoll: That completes Mr. Blakeslee's direct examination.

Commissioner Mitchell: Thank you, gentlemen.

Mr. Lauren Wright: One question for clarification.

## QUESTIONS FOR CLARIFICATION

Mr. Lauren Wright: I notice the year 1966 is the only year that is less than the preceding year. Was that a mistake perhaps?

The Witness: No, that was not a mistake. That was higher in anticipation of the incoming Bridge Dam power from the Colorado River.

Mr. Lauren Wright: Thank you.

The Witness: Of course it may or may not be true."

## Appendix 2.

Appendix 2: Extracts from testimony offered on February 17, 1961 being pages 2839 and 3840 of the transcript.

"The Witness: Should I proceed?

Mr. McCarthy: What were the three customers you gave us before?

The Witness: The three customers were Edison, Department of Water and Power, California Electric Power and California Portland Cement and Riverside Cement.

Q. What are those figures you gave us before?

A. I beg your pardon?

Q. You showed figures for the five customers yearly one forty-six?

A. Yes. I gave them to you for Edison. I gave you the total for all G-54 electric customers, steam plant customers.

Now, as I understand it, you wish to have the year by year totals? I will give them to you to the nearest hundred billion—to the nearest billion cubic feet by years, and that will cover the steam-electric customers who have not evergreened, namely, Edison, Department, and Cal Electric Power. For the year 1962, Edison's figure I originally gave you: 65 billion cubic feet; Department of Water and Power fifty-two and one tenth billion cubic feet; California Electric Power 14.0 billion cubic feet.

For the year 1963, Edison, 73 billion cubic feet; Department of Water and Power, 59 billion cubic feet; Cal Electric Power, 12-8 10ths billion feet.

For the year '64, Edison, 82 billion cubic feet; Department of Water and Power, 63.2 billion cubic feet; Cal Electric Power, 13.1 billion cubic feet.

For the year 1965, Edison, 89 billion cubic feet; Department, 62.8 billion cubic feet; Cal Electric Power, 14.0 billion cubic feet.

The year 1966, 95.4 billion cubic feet for Edison; Department, 62.0; Cal Electric, 17.8.

Mr. McCarthy: That is what we wanted. Thank you."

Office Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

Office Supreme Court, U.S.
FILED
JAN 7 1963
JOHN F. DAVIS, CLERK

OCTOBER TERM, 1962

No. 445

SOUTHERN CALIFORNIA EDISON COMPANY, a corporation,

*Appellant,*

*vs.*

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

*Appellee,*

SOUTHERN CALIFORNIA GAS COMPANY and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA,

*Real Parties in Interest.*

## Supplement to Motion of Southern California Gas Company and Southern Counties Gas Company of California to Dismiss Appeal; or, Alternatively, Suggestion of Mootness.

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*Appellee.*

SOUTHERN CALIFORNIA GAS COMPANY and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA,

*Real Parties in Interest.*

**Supplement to Motion of Southern California Gas Company and Southern Counties Gas Company of California to Dismiss Appeal; or, Alternatively, Suggestion of Mootness.**

1. Southern California Gas Company and Southern Counties Gas Company of California, hereby move, as a supplement and addition to their motion to dismiss appeal heretofore filed, to dismiss the appeal herein on the ground that it has become and is, and the questions raised herein have become and are, moot.

2. It is the purpose of the moving parties by this supplemental motion to bring to the Court's attention facts that in the opinion and submission of the moving

parties render the within appeal moot and require its dismissal; or alternatively, that withdraw certain of the questions raised from the power of this Court to entertain or decide them.

3. The facts upon which this supplemental motion is based follow:

(a) The moving parties applied to the Public Utilities Commission of the State of California for a certificate that public convenience and necessity required the construction, operation and maintenance by them in California of a pipeline for the transportation of natural gas, *i.e.*, the so-called "Rock Springs Project." Proceedings upon that application resulted in an order granting the certificate applied for. Appellant herein appeals from a judgment of the Supreme Court of the State of California refusing to review, and thereby in legal effect affirming, that order of the Commission. [See the Motion to Dismiss, heretofore filed by the moving parties, pp. 4-8; 23 (para. *Second*).]

(b) Shortly before that order was issued, and after the hearings on the certificate-application of the moving parties had been completed before the Commission, appellant and California Gas Transmission Company filed with the Commission applications for a certificate that public convenience and necessity required the operation and maintenance by them of a pipeline for the transportation and distribution of natural gas, *i.e.*, the so-called "Pemex Project."[1] In the late stages of a

[1]These applications are numbered and referred to, respectively, as 42931 and 42932.

supplementary or compliance hearing on the Rock Springs application [see, the Motion to Dismiss heretofore filed by the moving parties, pp. 5-7] parties other than appellant moved that this application be consolidated, for a comparative hearing, with the by-then pending Pemex application. One of the questions raised in this appeal is whether it was a denial of appellant's constitutional right for the Commission to refuse so to consolidate the hearings on the Rock Springs and Pemex applications. [*Statement as to Jurisdiction*, pp. 9, 41-44.] Another question is whether by hearing the Rock Springs application separately from and before hearing the Pemex application the Commission unconstitutionally prejudged the latter application. [*Statement as to Jurisdiction*, pp. 39-41.]

(c) On November 23, 1962 appellant and California Gas Transmission Company notified the Commission that they intended to and would withdraw their applications for certification of the Pemex project.[2] Upon receipt of this notification the Commission gave notice to all parties to the application-proceeding (including the moving parties herein) that the then pending hearing on the Pemex applications had been taken off the calendar because the applications had been withdrawn.[3] On November 26, 1962 appellant and California Gas Transmission Co. filed with the Commission a formal

[2] A true and correct copy of this notification is printed as document "1" in the appendix to this motion.

[3] A true and correct copy of this notice is printed as document "2" in the appendix to this motion.

withdrawal of their applications.[4] As a consequence there is not now pending any application by appellant for certification of the Pemex Project and the proceedings heretofore brought for that purpose are now at an end.

4. The only relief that could conceivably be granted by this Court to appellant in respect of the questions mentioned in paragraph 3(b) above, would be a reversal of the judgment appealed from in circumstances and with an expression of opinion that would require consolidation, or other simultaneous hearing, of the Rock Springs and Pemex applications. Relief of that sort could not now be effectively given, because the Pemex application is no longer a reality and no hearings or decisions in respect of it need be or will be had or made by the Commission. No decision of this Court, therefore, "would protect any rights [appellant] may once have had. . . ." [*Doremus v. Board of Education*, 342 U.S. 429, 433.]

Thus, the subject-matter to which the questions relate has been withdrawn and there is nothing in that respect upon which the appeal may effectively operate. It follows that to the extent of those questions this appeal is moot. [*Kimball v. Kimball*, 174 U.S. 158, 162-163; See, also: *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 459; *Amalgamated Association v. Wisconsin Emp. Rel. Bd.*, 340 U. S. 416, 418; *Heitmuller v. Stokes*, 256 U.S. 359, 361-362; *Royal Cadil-*

[4] A true and correct copy of this withdrawal is printed as document "3" in the appendix to this motion.

*lac Service v. Interstate Commerce Com.*, 317 U.S. 595; *Ford Motor Co. v. N.L.R.B.*, 305 U.S. 364, 372, 375; *Alton v. Alton*, 347 U.S. 610.] And, of course, this Court is "without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it. . . ." [*St. Pierre v. United States*, 319 U. S. 41, 42; *United States v. Alaska S. S. Co.*, 253 U.S. 113, 116.]

Dated: December 3, 1962.

Respectfully submitted,

HERMAN F. SELVIN,
HARRY P. LETTON, JR.,
JOSEPH R. RENSCH,
MILFORD SPRINGER,

/s/ By HERMAN F. SELVIN,
*Attorneys for moving parties.*

## APPENDIX.

### Document "1".

[On Western Union form addressed to R. J. Pajalich, Secretary, Public Utilities Commission, dated November 23, 1962.]

RE: APPLICATIONS 42931 and 42932. JOINT NOTICE OF WITHDRAWAL OF ABOVE APPLICATIONS OF SOUTHERN CALIFORNIA EDISON COMPANY AND CALIFORNIA GAS TRANSMISSION COMPANY WILL BE FILED IN YOUR LOS ANGELES OFFICE ON MONDAY, NOVEMBER 26. SUCH WITHDRAWAL IS NECESSITATED BECAUSE PROJECT IS NOW IN PROCESS OF REVISION WHICH IS SO SUBSTANTIAL AND FAR-REACHING IN NATURE THAT THERE IS NO PURPOSE IN CONTINUING THE PROCESSING OF SAID APPLICATIONS. TELEGRAPHIC COPIES OF THIS TELEGRAM ARE BEING SENT TO ALL PARTIES WHO HAVE BEEN ALLOTTED TIME FOR ORAL ARGUMENT NOW SCHEDULED FOR NOVEMBER 28 and 29.

### Document "2".

Before the Public Utilities Commission of the State of California.

Application No. 42931

In the matter of the application of CALIFORNIA GAS TRANSMISSION COMPANY, a California corporation, for a certificate that the Present and Future Public Convenience and Necessity require or will require the construction and operation of a natural gas pipeline and related facilities from a point on the United

States-Mexico International Boundary near Mexicali, Mexico, to electric generating plants in the metropolitan area of Los Angeles, California, and for authority to issue and sell securities.

Application No. 42932

In the matter of the application of SOUTHERN CALIFORNIA EDISON COMPANY to participate in a new natural gas pipeline project to the extent set forth herein and in support of the proposal of California Gas Transmission Company.

NOTICE OF REMOVAL FROM CALENDAR

TO: ALL APPEARANCES.

YOU ARE HEREBY NOTIFIED that the Public Utilities Commission of the State of California has removed the above entitled matters including the scheduled Oral Arguments for November 28 and 29, 1962 from its calendar since said applications have been withdrawn.

BY ORDER OF THE PUBLIC UTILITIES COMMISSION.

Dated at San Francisco, this 23rd day of November, 1962.

R. J. Pajalich, Secretary
Public Utilities Commission
of the State of California

cc: Los Angeles (2)
nr

**Document "3".**

Before the Public Utilities Commission of the State of California.

Application No. 42931

In the Matter of the Application of California Gas Transmission Company, a California Corporation, for a Certificate of Public Convenience and Necessity, etc.

Application No. 42932

In the Matter of the Application of Southern California Edison Company to Participate in a New Pipeline Project, etc.

## JOINT NOTICE OF WITHDRAWAL OF APPLICATION.

California Gas Transmission Company (CalGas) and Southern California Edison Company (Edison) hereby jointly file their Notice of Withdrawal of the above applications.

In Application No. 42931 CalGas is requesting a certificate that the present and future public convenience and necessity require or will require the construction and operation of a natural gas pipeline and related facilities from a point on the United States-Republic of Mexico international boundary near Mexicali, Mexico, to electric generating plants of Edison in the Metropolitan area of Los Angeles, California, and for authority to issue and sell securities. In Application No. 42932, Edison seeks authorization to participate in the above natural gas pipeline project to the extent set forth therein and in support of CalGas' proposal.

The project covered by these applications is now in the process of revision, which revisions are expected to be completed shortly. Such revisions include matters such as gas supply, route of the pipelines, facilities, and costs and contemplate possible service to the Department of Water and Power of the City of Los Angeles as well as to Edison. Since these revisions are of a substantial and far-reaching nature, there appears to be no purpose in continuing the processing of the above applications.

Accordingly, we respectfully withdraw the above-captioned applications.

Respectfully submitted,

[Names of other Counsel]

November 26, 1962.

CALIFORNIA GAS TRANSMISSION COMPANY,
By /s/ HARRY S. LITTMAN,
*Its Attorney,*

SOUTHERN CALIFORNIA EDISON COMPANY,
By /s/ WILLIAM E. MARX,
*Its Attorney.*

District of Columbia : ss

Harry S. Littman, being first duly sworn according to law, says that he is an attorney for California Gas Transmission Company; that he has read the foregoing Notice of Withdrawal of Application of said company and is familiar with the contents thereof; that he has executed the same for and on behalf of said company with full power and authority so to do; and that the facts set forth therein are true and correct to the best of his knowledge, information and belief.

/s/ HARRY S. LITTMAN,

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia this 23rd day of November, 1962.

/s/ LOUISE H. PARMER,
*Notary Public.*

My Commission expires February 28, 1965.

Office Supreme Court, U.S.
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JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

No. 445.

SOUTHERN CALIFORNIA EDISON COMPANY, a corporation,
*Appellant,*

*vs.*

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
*Appellee,*

SOUTHERN CALIFORNIA GAS COMPANY and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA,
*Real Parties in Interest.*

## Motion of Southern California Gas Company and Southern Counties Gas Company of California to Dismiss Appeal; and Supporting Brief.

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IN THE

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No. 445.

SOUTHERN CALIFORNIA EDISON COMPANY, a corporation,
*Appellant,*

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
*Appellee,*

SOUTHERN CALIFORNIA GAS COMPANY and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA,
*Real Parties in Interest.*

## Motion of Southern California Gas Company and Southern Counties Gas Company of California to Dismiss Appeal; and Supporting Brief.

Southern California Gas Company and Southern Counties Gas Company of California* hereby move the Court, pursuant to rule 16, Revised Rules of the Supreme Court of the United States, to dismiss the appeal herein.

This motion is made upon the following, and separately upon each of the following grounds:

1. The appeal does not present a substantial federal question.

*The two moving parties are named in the caption of the notice of appeal as "Real Parties in Interest." They are entitled to be treated as, and are in fact, appellees for reasons that are set forth in a motion to correct caption filed by them concurrently herewith.

2. None of the federal questions sought to be reviewed was, and the record does not show that it was, expressly passed on.

3. None of the federal questions was, and the record does not show that it was, timely or properly raised below.

4. The judgment rests upon an adequate non-federal basis.

5. The appeal is not within the jurisdiction of this Court.

The facts upon which this motion is based are set forth in the supporting brief, annexed hereto; and they are by this reference incorporated herein.

Dated: October 12, 1962.

Respectfully submitted,

HERMAN F. SELVIN,
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**Brief in Support of Motion of Southern California Gas Company and Southern Counties Gas Company of California to Dismiss.**

## Opinion Below.

There was no opinion of the Supreme Court of the State of California. The Public Utilities Commission—whose decision the Supreme Court declined to review—filed two opinions. The first opinion, issued December 28, 1960, is printed as Exhibit "C" to the "Petition for Writ of Review or, in the alternative for a Writ of Mandamus"[1] filed in the court below by appellant. A supplemental opinion, issued June 6, 1961 after a further hearing had been had, is printed as Exhibit "A" to the Petition. Review in the state Supreme Court, and here, was sought only of the latter decision.

## Statement of the Case.

The complete record that was before the court below was designated by appellant in its notice of appeal for transmission to this Court. Nonetheless, there is in the jurisdictional statement hardly a supporting reference to the record for the many assertions of fact contained in the statement. We mention this fact because a very large number of appellant's assertions of fact are outside the record that was before the court below. Instead of noting each one of these instances it will be simpler

[1]Hereinafter referred to simply as "Petition."

merely to present our own statement of the case, appropriately referenced to the record.[2]

Southern California Gas Company and Southern Counties Gas Company of California (hereinafter called "appellees") are public utility gas corporations engaged in distributing and selling gas at retail to the public at large in Southern California. Their customers number well over two million. [*Petition*, Exhibit "C," p. 2(n.1).] The appellant, Southern California Edison Company, is an electric public utility which purchases a part of its requirement of gas for boiler fuel from appellees on an interruptible basis. [*Petition*, Exhibit "C", pp. 28-29.] An interruptible industrial customer, such as appellant, is one whose service is subject to discontinuance if there is insufficient gas or capacity

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[2]We are not advised of the sequence in which the documents comprising the transcript of record forwarded to this Court were bound and paginated. Accordingly, our references will be to the document in question and the page thereof on which the referenced material is found. For that purpose we will use the following abbreviations for the documents listed at pages 2-3 of the "Notice of Appeal to the United States Supreme Court":

(1) Petition for Writ of Review or, in the Alternative, for a Writ of Mandamus, including exhibits —*"Petition."*

(2) Memorandum of Points and Authorities in Support of Petitions, etc., including appendices and verification —*"Memo."*

(3) Letter dated August 4, 1961, etc. —*"Letter."*

(4) Answer of respondent Public Utility Commission, etc. —*"Com. Ans."*

(5) Answer and Brief of Southern California Gas Company and Southern Counties Gas Company of California, etc. —*"Gas Cos. Ans."*

(6) Brief of City of Los Angeles in Opposition, etc. —*"L.A. Br."*

(7) Reply of petitioner to briefs in opposition, etc. —*"Reply"*

(8) Notice of Appeal to the United States Supreme Court —*"Notice"*

at the time to supply the needs of firm customers. Appellees serve about 1900 interruptible customers. [*Petition*, Exhibit "C", p. 17.]

In 1958 appellees applied to the Public Utilities Commission of the State of California for a certificate that public convenience and necessity required the construction, operation and maintenance by them of the California section of the so-called Rock Springs Project, *i.e.*, a 34-inch pipeline and related facilities between a point on the California-Nevada border and appellees' distribution system, for the transportation of natural gas from Kansas, Oklahoma, Rocky Mountain and ultimately Canadian, sources, bought at the border from El Paso Natural Gas Company (hereinafter called "El Paso"). The gas will be distributed to the public at large by appellees. [*Petition*, Exhibit "C", pp. 2-3, 32.] Hearings were had by the Commission upon that application. Among the various interested parties who appeared at those hearings and thus became a party to the certification proceeding was the appellant. It took the position that because of efforts on its part to get a direct and non-interruptible supply of gas a part of its custom might be lost to appellees; and that the possible loss of this custom should be considered by the Commission in determining whether the Rock Springs Project was economically feasible. All the interested parties including appellant were fully heard. [*Petition*, Exhibit "C", pp. 3, 18, 28-29. *Ibid.*, Exhibit "A", pp. 1-2, 10.]

On December 28, 1960 the Commission made its order granting the requested certificate of public convenience and necessity but upon certain conditions. [*Petition*, Exhibit "C", pp. 47-49.] That order was

based upon an extended written opinion and express and specific findings of fact. [*Petition*, Exhibit "C", pp. 1-47.] In the opinion the commission summarized the evidence and the respective positions taken by the parties, including in adequate detail the position there taken by the present appellant. [*Petition*, Exhibit "C", pp. 28-29.] It analyzed and weighed the evidence, indicating in the course of that process its view of the facts, the conclusions at which it had arrived and the reasoning that led it to those conclusions. The effect of a possible loss of appellant's business upon the economic feasibility of the project was noted and considered. [*Petition*, Exhibit "C," pp. 28-29, 35.] And the Commission's order was set forth at length. [*Petition*, Exhibit "C," pp. 47-49.]

So far as relevant here the conditions imposed on the certification order were: (1) that appellees obtain a new supply contract with El Paso, acceptable to them and the Commission that would (a) eliminate the need for a rate increase as a result of the project during its early years; (b) reduce the period before the project would become economically feasible; and (c) provide a load-building period and schedule of gas importation that would maintain a reasonable balance in the two-fuel (gas and oil) economy of Southern California; and (2) that appellees file a revised economic feasibility study showing the economic outlook approximately as of the date of the new supply contract. [*Petition*, Exhibit "C", pp. 47-49.]

Thereupon appellees revised their supply contract with El Paso and filed with the Commission a "Statement of Compliance With Conditions and Request For Issuance of Supplemental Order Authorizing Construction." It was alleged in that Statement and shown by appropriate facts and data, that appellees had complied with all of the conditions on certification imposed by the Commission in its order of December 28, 1960. [*Petition*, Exhibit "A", pp. 1, 2-4.] A hearing was then had by the Commission, at which appellant appeared and was fully heard. [*Petition*, Exhibit "A", pp. 1-2, 10.] On June 6, 1961 the Commission made an order in which it expressly found that appellees had complied with all the previously imposed conditions on certification and that the new supply contract was acceptable to the Commission. It also found that the new contract (a) eliminated the necessity for a rate increase as a result of the project; (b) reduced the period before the pipeline project would be economically feasible; (c) provided a loadbuilding period and a schedule of gas importation that would maintain a reasonable balance in the two-fuel (oil and gas) economy of Southern California. There was also a finding that appellees had prepared and filed a revised economic-feasibility study which showed the economic supply-and-requirements situation as of the date of the new contract. [*Petition*, Exhibit "A", pp. 11-12.] The effect upon the economic feasibility of the project of a possible loss of appellant's business was discussed and

considered by the Commission. [*Petition,* Exhibit "A," pp. 5-6.] So, it was concluded, the certificate of public convenience and necessity theretofore granted was and should be made applicable to the pipeline project as revised by the Statement of Compliance. [*Petition,* Exhibit "A", pp. 13-15.]

Pursuant to the California practice, appellant sought to have this order reviewed by the State Supreme Court by petitioning that court for the issuance of a writ of review. It was the only order in the case that appellant sought to have reviewed. The petition was opposed by appellees on various state grounds. On January 31, 1962 appellant's petition for a writ of review was denied without opinion.[3] The order of denial became final on March 2, 1961. [*Cal. Rules of Court,* rule 24(a); 57 Adv. Cal. 44.][4]

Appellant did not at any time during the hearings before the Commission join in any motion, or itself move, to consolidate those hearings with any other pending proceeding or to hold a comparative hearing. Such a motion was made by the Commission Staff in the last days of the hearing and, after the evidence had been closed and the cause submitted, by another party. [*Peti-*

[3] The order or judgment from which this appeal is taken was not designated by appellant for inclusion in the transcript sent to this Court. [*See, Notice,* pp. 2-3.] It has, however, been included as an appendix to the Statement as to Jurisdiction.

[4] The cited rule, so far as relevant, reads as follows:

> ". . . A decision of the Supreme Court becomes final 30 days after filing unless prior to the expiration of said 30-day period either a shorter time, or an additional period of time not to exceed 30 days, is ordered by the court. . . ."

*tion*, Exhibit "A," pp. 8; 9.] Both motions were denied. [*Petition*, Exhibit "A," p. 13.] After the order here involved was issued by the Commission appellant petitioned for a rehearing. It did not assign denial of the consolidation motions as error or as a ground for rehearing. [*Petition*, Exhibit "E," pp. 1-12, *passim*.]

For some time past, and certainly before and during the Commission hearings of the instant cause, appellant has been seeking to get for itself by direct procurement a non-interruptible supply of out-of-state gas to use as boiler fuel [*Petition*, Exhibit "C", pp. 18, 28-29.] These efforts culminated in the so-called "Pemex" project by which, if it is certificated, appellant will receive on a non-interruptible basis a supply of gas from the Gulf Coast area that will be transported by pipeline to it and used by it as boiler fuel in Southern California. Just before the first decision in the instant cause was issued by the Commission, and after the hearing on which that decision was based had been completed, appellant and California Gas Transmission Company filed an application with the California Commission for a certificate that public convenience and necessity required the operation and maintenance by them of a pipeline for the transportation to appellant of the Gulf Coast gas to which we have just referred.[5] [*Petition*,

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[5]Appellees filed their application for certification of the California part of the Rock Springs project November 7, 1958. [*Petition*, Ex. "C," p. 2.] The hearing of the application began January 13, 1959, and ended July 29, 1960. [*Ibid.*, Ex. "C,"

Exhibit "C", pp. 19-20, 43 (n.15). *Memo.*, pp. 4-5.] This is the application that led belatedly to the claim that a comparative hearing should be had.

It was appellant's contention in the instant proceeding before the Commission that upon certification of the Pemex project a part of its fuel needs would be supplied through it thus obviating to that extent the necessity of procurement of gas from appellees; and that this circumstance should be considered in determining the economic feasibility of the pipeline that appellees were seeking to have certificated. [*Petition*, Exhibit "C", pp. 28-29, 35. *Ibid.*, Exhibit "E", pp. 8-9.]

In the record presented to the state Supreme Court to support appellant's petition for a writ of review it was not shown that the entire load being supplied by appellees to appellant would be lost as the result of certification of the Pemex project. Nor was it shown how much of the load would be lost on that account. It was only shown that some unspecified part of it would be lost; *i.e.*, that the Pemex project, if completed and certified, would transport "substantial quantities of natural gas . . . required for operation of certain of its [appellant's] steam-generating plants . . . ." [*Petition*, p. 5, para. VII.] On the other hand, the economic feasibility studies and other evidence presented by appellees showed the effect upon the project

p. 3.] The Commission's decision of the matters then heard was issued on December 28, 1960. [*Ibid.*, Ex. "C," p. 49.] The application for certification of the Pemex project was not filed until December 5, 1960. [*Petition*, p. 5, para. VII.]

of an assumed loss of appellant's business. [*Petition*, Exhibit "A", pp. 4-6.] The Commission took this evidence into account, found that its previously imposed conditions had been complied with and that the certificate of public convenience and necessity should issue.* [*Petition*, Exhibit "A," pp. 6, 10-14. See also, pp. 13-16, *infra*.]

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*"Economic feasibility" as such is merely one of the evidential elements entering into the ultimate determination of public convenience and necessity. In the California practice, findings of fact are determinations of ultimate fact, not recitations of evidential or probative facts; consequently, it is not generally required that the evidential facts or subordinate elements entering into the ultimate fact be separately found upon. Such elements are deemed resolved in favor of the ultimate fact found. [*Monson & Co. v. Pearson*, 199 Cal. 295, 304, 249 Pac. 191, 196; *Southern Pacific Co. v. Railroad Com.*, 13 Cal. 2d 89, 108-109, 87 P. 2d 1055, 1064-1065; *Southern Calif., etc., Lines v. Public Util. Com.*, 35 Cal. 2d 586, 592, 220 P. 2d 393, 397-398.] Furthermore, it is the California rule that the lower tribunal is deemed to have found impliedly every fact necessary to support the judgment that can be inferred from the findings it made expressly and the judgment it rendered. [*Anglo-Calif. T. Co. v. Oakland Railways*, 193 Cal. 451, 460-461, 225 Pac. 452, 455; *San Diego & Coronado Ferry Co. v. Railroad Com.*, 210 Cal. 504, 508-509, 292 Pac. 640, 642.] To the extent that economic feasibility was an element of, or necessary to, a finding of public convenience and necessity the Commission must be deemed to have found that the Rock Springs project was economically feasible.

## ARGUMENT.

### I.

### The Questions Raised Are Not Substantial.

**1. Detailed Opinions Filed by the Commission Fully Disclosed Its Determination of the Litigated Issues of Fact.**

The question whether a failure by the Commission to make findings of fact would be a denial of due process is not substantial because the Commission made adequate findings. The question, therefore, does not arise on this record. It is one that need not be decided.

*First:* The purpose of any requirement for special findings of fact is, of course, that there might be made known the tribunal's determination of the principal issues litigated. That disclosure need not always take the form of formal findings of fact. Indeed, in the federal courts, where special findings of fact and conclusions of law separately stated are mandatory [F.R.C.P., rule 52(a)], it has long been the rule, without any thought or suggestion that due process was being denied, that the failure to make formal findings is immaterial if there is an opinion or memorandum of decision in which the court states its conclusions with respect to the issues of fact. [*Marconi Wireless Teleg. Co. v. United States*, 320 U.S. 1, 58; *Hazeltine Corp. v. General Motors Corp.*, 3 Cir., 131 F. 2d 34, 37; *Burnham Chem. Co. v. Borax Consolidated*, 9 Cir., 170 F. 2d 569, 574, *cert. den.*

336 U.S. 924; *Green Valley Creamery v. United States*, 1 Cir., 108 F. 2d 342, 347.][7]

As has been noted [see, p. 3, *supra*], the commission issued two opinions in this cause. Those opinions disclose with adequate fullness the determinations of fact made by the commission. That is especially so in respect of the question of fact with which appellant is mainly concerned, *i.e.*, whether the Rock Springs project would be economically feasible assuming that appellant's requirements of gas were satisfied from sources other than the appellees. [See, Statement As To Jurisdiction, pp. 11-12, 15-16.]

In its first opinion the commission, after a detailed recitation and consideration of the evidence and the contentions of the parties, expressly said: "Looking at the project from the short term (first 7 years) the project does not appear economically feasible . . ." [*Petition*, Exhibit "C", p. 34.] It went on to show the bases of that conclusion by pointing out, among other things, that appellees' studies of economic feasibility included the full gas requirements of all interruptible customers, although three of the largest customers, including appellant, had given notice they would not permit automatic renewal of their contracts. [*Petition*, Exhibit "C", p. 35.] For this and other reasons, the commission found that the disadvantages of the project outweighed its advantages unless appellees could get a new contract from El Paso that would

[7] All of the cases cited were decided before the 1946 amendment to F. R. C. P., rule 52(a) which added a specific provision permitting an opinion or memorandum of decision to serve in place of formal findings of fact.

improve the economic feasibility of the project. [*Petition*, Exhibit "C", pp. 44-48.] Accordingly, it granted a certificate of public convenience and necessity but subject to compliance with certain conditions designed to accomplish that improvement. [*Petition*, Exhibit "C," pp. 46-49.]

After the compliance hearing had been concluded the commission issued another opinion. [*Petition*, Exhibit "A".] It was there noted, with respect to economic feasibility, that evidence had been introduced to show the impact upon appellees of "the possible loss of Edison [appellant's] load. . . ."[5] [*Petition*, Exhibit "A," p. 5.] In the event of that loss, the Commission continued, the result would be a revenue deficiency in the first five years of the project; but after "the first four years the growth in the firm load should be such as largely to offset the effect of complete loss of Edison load." [*Petition*, Exhibit "A," pp. 5-6.] It was the Commission's express finding, therefore, that appellees had complied with the conditions previously imposed. Accordingly, the certificate of public convenience and necessity previously granted conditionally was made unconditional. [*Petition*, Exhibit "A," pp. 11-15.]

Thus it adequately appears from the commission's opinions that it determined that the project would be economically feasible even if all of appellant's gas busi-

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[5]It was not shown at any time that all of the Edison load would be lost to appellees; but only that some unspecified part of it *might* be lost. [See, pp. 10-11, *supra*.]

ness were lost to appellees. That is especially so when due regard is given to the following facts:

(1) The conditions imposed were concerned with the question of economic feasibility; (2) the conditions were found to have been complied with; (3) the certificate was made unconditional after consideration had been given to evidence of the effect on the project of loss of appellant's business, whereas theretofore the Commission had had some doubts on the score of economic feasibility engendered in part by the possibility of such a loss; and, (4) it was expressly noted that the revenue deficit that might be caused by that loss would be made up.

The Commission's findings must be read, of course, as they would be read in California by a state court. There it would be held that the Commission will be deemed to have found every fact tending to support its order that was reasonably inferable from the express findings and order it made. [See, note 6, *supra*. Also, *Triangle Conduit etc. Co. v. Federal Trade Com.*, 7 Cir., 168 F. 2d 175, 179, *aff'd.*, 336 U.S. 956.]

*Second:* If formal findings were necessary, such findings on all issues material to the judgment appealed from *were made*.

The proceeding below, out of which this appeal arises, was an application by the appellees to the state Public Utilities Commission for a certificate that public convenience and necessity required the construction, operation and maintenance by them of a certain

pipeline for the transportation and sale of gas for light, heat and power. The principal, indeed the only issue involved in that proceeding was whether public convenience and necessity so required. The Commission expressly found that it did and, accordingly, ordered the certificate issued subject, however, to certain specified conditions. [See, pp. 5-6, *supra*.] Economic feasibility was merely an evidential or subordinate element entering into that determination. [See, note 6, p. 11, *supra*.] No review of that order was sought by anyone.

Appellees then revised the project and their contract with El Paso in the respects required by the conditions on the certificate imposed by the Commission. They informed the Commission of their compliance and requested the making of a supplementary order authorizing it to proceed with the construction of the pipeline.[9] A hearing was had at which the only issue litigated was whether appellees had complied with these previously imposed conditions. The Commission found expressly and *seriatim* that appellees had complied with all of the conditions. [See, pp. 6-8, *supra*.] It, therefore, ordered that the certificate theretofore granted be made applicable to the new contract and project as revised by appellees' compliance with the conditions. That is the order, and the only order, that appellant sought to have reviewed by the state Supreme Court. It is the order involved in the instant appeal.

Obviously, as findings on the principal or material issues were in fact made, the question whether a failure to make them would be a denial of due process does not arise.

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[9] One of the previously imposed conditions was that construction not be started until authorized by supplemental order. [*Petition*, Ex. "C," p. 48 (No. 4).]

**2. The Requisite Bases for a Comparative Hearing—i.e. Mutual Exclusivity and Timeliness of Application—Were Not Established.**

The hearings of this case before the Commission went on for 29 days during a period of one year and seven months. [*Petition*, Exhibit "C," p. 3. *Ibid.*, Exhibit "A," pp. 1-2.] Some time during the last four days of hearing; and long after the certificate had been conditionally granted, the Commission Staff moved to consolidate appellees' application with the then pending application by appellant to certify the Pemex project. [*Petition*, Exhibit "A," p. 8.] Appellant did not join in the motion. The Pemex application had been pending since only December 5, 1960, whereas the hearing on the Rock Springs project had begun on January 13, 1959. [*Petition*, p. 5; *Ibid.*, Exhibit "C," p. 3.] After all hearings on appellees' application had been completed and the matter submitted for decision, California Gas Transmission Company moved to reopen the hearing and consolidate the proceeding with the Pemex application. [*Petition*, Exhibit "A", p. 9.] Appellant did not join in this motion either. Both motions were denied. That denial was well within the discretion vested in the Commission. It raises no substantial federal question.

*First:* Appellant was not denied, but had, a hearing on the question of the asserted conflict between its and the appellees' applications. The basis of the procedural device of a consolidation for a comparative hearing—the so-called Ashbacker doctrine, see *Ashbacker v. Federal Commun. Com.*, 326 U. S. 327—is the necessity of preserving to an applicant for a license or permit to engage in a business activity the opportunity ac-

corded him by the licensing statute to be fairly heard on the merits of his application. When, therefore, two applications that are mutually exclusive are pending it will be a denial of the statutory right to a hearing to grant only one of them without hearing both, thus in effect denying the ungranted one without a hearing. Since the applications are mutually exclusive and cannot both be granted, the granting of one is in necessary effect a denial of the other.

That was not the situation here, because the two applications were not shown to be mutually exclusive. [See, pp. 5, 8-10, *supra.*] That was, however, the situation in *Ashbacker, supra,* 326 U. S. 330-331; and, accordingly, that was the situation that impelled this court to say, ". . . We only hold that where two bona fide applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity [to have a hearing] which Congress chose to give him." [326 U. S. at 333.] At bar, however, the other applicant (appellant) was given and availed itself of the opportunity to be heard in opposition to the assertedly conflicting application. It had the opportunity to present and did present to the Commission in the hearings that resulted in the granting of appellees' application everything it cared to offer by way of showing that its, rather than appellees' application should be preferred. [See, pp. 5, 7-8, 10-11, *supra.*]

*Second:* It is clear from this Court's statement of its holding in *Ashbacker, supra,* 326 U. S. at 333, as well as from the decisions generally [see, *e.g., Eastern Air Lines v. Civil Aero. Bd.,* 2 Cir., 271 F. 2d 681, 685; *Western Air Lines v. Civil Aero. Bd.,* 9 Cir., 184

F. 2d 545, 549-550] that the comparative hearing device comes into operation only if the two pending applications are in fact mutually exclusive. That essential fact was not alleged or claimed by appellant to exist in the instant case. [*Petition*, pp. 1-13, *passim*.] Indeed, in its petition for rehearing before the Commission, and as well in its brief in the state Supreme Court appellant virtually conceded that the two projects were not mutually exclusive but could co-exist.[10] [*Petition*, Exhibit "E," p. 5; *Memo.*, p. 24.]

That concession is in accord with the facts. The two projects are not designed to serve the same purpose. The Rock Springs project will bring gas from various fields in Kansas, Oklahoma, the Rocky Mountain area, and ultimately Canada, delivered by El Paso to appellees who, in turn, will distribute it to the public at large. Pemex, however, will bring gas from wholly different fields, delivered by California Gas Transmission Com-

[10] In the petition for rehearing appellant, discussing the two projects, said:

> ". . . while we believe that it is entirely possible that upon proper records this Commission may conclude that it can and should certificate both projects . . . we must anticipate a contention . . . that . . . the Commission's said Decision No. 62117 was not intended to be so construed. [*Petition*, Ex. "E," p. 5.]

Similarly in its brief in the State Supreme Court appellant also said:

> ". . . It is true that there has been evidence presented before the Commission in both [Pemex and Rock Springs] proceedings, indicating the California market may be able to utilize both of these supplies. [Cits.] While we believe that it is entirely possible that, upon a proper record, the Commission may conclude that it can and should certificate both projects, Petitioner [appellant] is in simple fairness and justice, entitled to have disclosed what the Commission has in fact concluded upon this vital issue. . . ." [*Memo.*, p. 24.]

pany to appellant for the latter's use as boiler fuel. Even if Pemex results in the complete loss of appellant as a customer of appellees, the latter serve millions of people who need and use gas. The gas delivered by the Rock Springs project will still be needed and availed of. [*Petition*, Exhibit "C", pp. 9-12. *Petition*, Exhibit "A", pp. 5-6.] There was absent, therefore, that mutual exclusivity that is the foundation upon which an order for a comparative hearing must rest.

*Third:* It has become firmly established that the problem of the order in which applicants should be heard, and whether contemporaneously or successively, is one for the discretion of the administrative agency concerned. [*Federal Commun. Com. v. WJR*, 337 U. S. 265, 272, 283; *United Air Lines v. Civil Aero. Bd., supra*, 228 F. 2d at 19; *Eastern Air Lines v. Civil Aero. Bd.*, App. D.C., 243 F. 2d 607, 609; *Western Air Lines v. Civil Aero. Bd., supra*, 184 F. 2d at 550; Davis, *Administrative Law Treatise* (1958), vol. 1, pp. 572, 573.] The absence of a showing of mutual exclusivity, the untimeliness of the request for a consolidation [see note 5, p. 9, *supra*], and the absence of any showing that the issues, parties and evidence involved in the two applications with which we are here concerned, are or would be the same, all support the exercise below of the Commission's discretion to deny the request made in the instant case. Surely, the question whether, in the circumstances peculiar to this case alone, that discretion was wisely exercised is not a question of such substantiality as to be entitled to invoke the interposition of this Court.

*Fourth:* No doubt the state statute here involved gives appellant the right to a hearing on its application for certification of the Pemex project. Whether the right to such a hearing entitles it to have its application consolidated with an earlier application that has already been heard and is at the decision stage when the request for consolidation is made is plainly a question of procedure governed by state law. It is a question without federal implications of any kind.

**3. Appellant Is Without Standing to Complain of the Denial of Another Party's Motion for Consolidation.**

The appellant has no standing to raise the question relating to consolidation for comparative hearing. That question, therefore, is not substantial for it arises in a context that makes it unnecessary, indeed improper, for this Court to decide it in the instant cause. ". . . it is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case . . ." [*Burton v. United States*, 196 U. S. 283, 295.] There is no such necessity when the question is raised by a party without standing to raise it. [See cases cited p. 22, *infra*.]

Appellant did not make or join in the making of any motion to consolidate hearing of the Rock Springs application with later hearing of the Pemex application. Denial of such a motion made by a co-party was not a ruling of which, under the state practice, appellant could complain, as we show in a moment. [See, p. 25, *infra*.] The making of that ruling was not a violation of any federal right inhering in appellant, if indeed it was a violation at all. *Vis-a-vis* the motion to consoli-

date and its denial, appellant was a stranger. [*Cf., Williams v. Eggleston*, 170 U. S. 304, 309.] Appellant did not seek a consolidation. The failure to consolidate, therefore, did not affect or change in any way the course of the proceeding to which appellant was committed. So far as any action by appellant is concerned the Rock Springs hearing would not have been consolidated with any other. It was apparently willing to have the Rock Springs hearing proceed independently of Peale. Thus it is plain that appellant suffered no direct injury as a consequence of the ruling. It has, therefore, no standing to raise or complain of the ruling as an asserted denial of federal right. [See, *Premier-Pabst Sales Co. v. Grosscup*, 298 U. S. 226, 227; *Moore Ice Cream Co. v. Rose*, 289 U. S. 373, 383; *Concordia Fire Ins. Co. v. Illinois*, 292 U. S. 535, 540; *Heald v. District of Columbia*, 259 U. S. 114, 123.]

**4. Judicial Review Is Provided by the Statute and Was Had in the Instant Case.**

Appellant's complaint of an absence of opportunity for judicial review is without substantiality. Judicial review of decisions of the Commission are provided by statute. [*Cal. Pub. Util. Code*, secs. 1756-1760, Statement As To Jurisdiction, Appendix "B", pp. 12-13.] Such a review was had by appellant.

*First*: The California statutes, except for provisions relating to stays which are immaterial here [*Cal. Pub. Util. Code*, secs. 1764-1767], are set out at length at pages 12-13 of Appendix "B" to the Statement As To Jurisdiction. They expressly provide a procedure by which review of decisions of the Commission may

be had in the highest court of the state. That review is discretionary only in the sense that certiorari is discretionary in the practice of this Court. And, however that may be, it is clearly no denial of due process that review is made dependent upon the appellate court's preliminary determination that the case is one that merits further attention on the part of the reviewing court. [See, *National Union of Marine Cooks v. Arnold* 348 U. S. 37, 41, 43; *People v. Western Air Lines*, 42 Cal. 2d 621, 632, 268 P. 2d 723, 729, *app. dis.* 348 U. S. 859. *Cf., Dorsey v. Gill*, App. D. C., 148 F. 2d 857, 877-878, *cert. den.* 325 U. S. 890; *Anderson v. Heinze*, 9 Cir., 258 F. 2d 479, 482, *cert. den.* 358 U. S. 889.]

*Second:* In the California practice denial of a "petition for review of an order of the commission is a decision on the merits both as to the law and the facts presented in the review proceedings. [cit.] This is so even though the order of this [state] court is without opinion . . . . ." [*People v. Western Air Lines, supra*, 42 Cal. 2d at 630-631, 268 P. 2d at 729; *Southern Calif. Edison Co. v. Railroad Com.*, 6 Cal. 2d 737, 747, 59 P. 2d 808, 812.] This Court has recognized that to be the California practice. [*Napa Valley Co. v. Railroad Com.*, 251 U. S. 366, 372-373.] Appellant, therefore, was not deprived of, but had, a judicial review of the order of the Commission of which it complains; and so has not been denied either due process or equal protection.

II.

**The Judgment Rests Upon an Adequate Non-Federal Basis.**

1. Assuming that the questions now raised were presented and decided as federal questions below, there were independent state grounds urged by appellees that were adequate in themselves under the state practice to impel and support the state court's denial of review. This Court is without jurisdiction to review a judgment that rests on adequate and independent state grounds. [*Edelman v. California*, 344 U. S. 357, 361-362; *Herb v. Pitcairn*, 324 U. S. 117, 125.] The record here does not show that the state court's judgment was not based on the state grounds that were urged by appellees. [See, Statement as to Jurisdiction, Appendix "A".] The failure of the record so to show makes it impossible to find in favor of jurisdiction of this appeal. The denial of the petition for a writ of review without opinion should be regarded as having rested on those grounds. Jurisdiction must be shown affirmatively; it cannot rest on conjecture or debatable inference. [*Citizens Nat. Bank v. Durr*, 257 U. S. 99, 106; *Stembridge v. Georgia*, 343 U. S. 541, 547-548; *Durley v. Mayo*, 351 U. S. 277, 281, 284-285; *Forbes v. State Council*, 216 U. S. 396, 399; *Phyle v. Duffy*, 334 U. S. 431, 444; *Bailey v. Anderson*, 326 U. S. 203, 206-207; *Ellis v. Dixon*, 349 U. S. 458, 460.]

2. The assertion of error in the denial of the motions for a comparative hearing was met by appellees with the contention, based on state law, that the appellant had no standing to raise or maintain the question because it had not made or joined in the motion [*Gas*

*Cos. Ans.*, p. 55 (*Fourth*)]; and the further contention, also based on state law, that denial of the motions that were made rested within the sound discretion of the Commission because (a) the showing in support of them was insufficient to show that the proceedings with which consolidation for hearing was sought were so similar to or comparable with the proceeding in which the motions were made in respect of parties, issues and evidence as to justify consolidation; and (b) the motions were not seasonably made but were so belatedly made as, if granted, to delay unduly the pending proceeding. [*Gas Cos. Ans.*, pp. 45-53-55.]

Each of these was an adequate and independent state ground upon which the state court could have based, and for all this record shows did base, its judgment. It is settled in California that one not making or joining in a motion cannot complaint of error in denying a motion made by a co-party. [*Calderwood v. Brooks*, 28 Cal. 151, 153; *Meda v. Lawton*, 214 Cal. 588, 590, 7 P. 2d 180, 181. *Cf.; Delger v. Jacobs*, 19 Cal. App. 197, 206, 125 Pac. 258; *Mock v. Santa Rosa*, 126 Cal. 330, 347-348, 58 Pac. 826; *Fisher v. Nash Bldg. Co.*, 113 Cal. App. 2d 397, 404, 248 P. 2d 466, 470-471.] Essentially this is the same rule invoked by this Court in *Puget Sound Power & L. Co. v. King County*, 264 U. S. 22, 25, in which it was held that it was too late for a party who did not raise the federal question in the lower court to raise it by joining in the assignment of errors of another party who did raise the question below.

So, too, is it settled that the granting and denial of a motion to consolidate—a "comparative hearing" is, of course, a form of consolidation of actions for hearing—

rests within the discretion of the tribunal to whom addressed [*Fisher v. Nash Bldg. Co., supra,* 113 Cal. App. 2d at 402, 248 P. 2d at 470. See, also, *Federal Communications Com. v. WJR, supra,* 337 U. S. at 272, 283.] It is not an abuse of that discretion to deny the motion when to grant it will unduly delay the pending hearing [see, *Beaudreau v. Allen,* 102 Cal. App. 2d 552, 556-557, 227 P. 2d 986]; or when the showing in its support fails to establish identity or similarity of parties, issues or evidence between the causes sought to be consolidated.[11]

3. Throughout the proceedings in the state supreme court appellees insisted that the record presented by appellant was incomplete and inadequate, in that it brought up only a small and obviously garbled part of the evidence taken and other proceedings had before the Commission; that it was the appellant's burden properly to allege or otherwise present the facts that entitled it to the remedy of a writ of review; and that its petition, because of the incompleteness of the factual showing made, did not show that it was entitled to the remedy sought. [*Gas Cos. Ans.*, pp. 3-4, 8 (n. 3), 28, 89-90.] For all that appears in the record presented to this Court the state supreme court may have denied the petition for a writ of review on this ground. Appellant has not shown that the denial was not so grounded and, therefore, has not met its burden of showing jurisdiction affirmatively. [See, cases cited, p. 24, *supra.*] Of

[11]Appellant did not include in the record it presented to the state Supreme Court and upon which it based its petition for a writ of review either its application in Peniex, appellees' application in Rock Springs, or any other pleading in the two proceedings.

course, a federal question arising in a state tribunal must be raised in accordance with the state's procedure; and a failure to comply with that procedure is in itself an independent state ground adequate to support the judgment in the case. [*Stembridge v. Georgia, supra*, 343 U. S. at 547; *Holley v. Lawrence*, 317 U. S. 518; *Edelman v. California*, 344 U. S. 557, 358-359.]

## III.

**The Questions Here Raised Are Reviewable, if at All, Only by Certiorari, Not Appeal, as Those Questions Do Not Involve the Asserted Repugnancy to Federal Law of a Statute of the State but Only of Some Intermediate Procedural Rulings in the Course of Decision of a Public Utility Certification Case.**

There is not drawn in question here the validity of a state statute on the ground of its repugnancy to the constitution, treaties or laws of the United States. This Court, therefore, is without jurisdiction by way of appeal. [28 U.S.C.A., sec. 1257 (2); *Wilson v. Cook*, 327 U. S. 474, 480; *United States Ship. Bd. etc. Corp. v. Sullivan*, 261 U. S. 146, 148-149.]

We may assume that for jurisdictional purposes the certification order of the state commission is deemed to be an act of the legislature. [See, *Atchison etc. Ry. Co. v. Public Utilities Commission*, 346 U. S. 346, 348, and cases there cited.] But that is not the order that is drawn in question here. What is drawn in question are two intermediate, procedural rulings that do not depend in any way on the validity or invalidity of the certification order, *i.e.*, denial of a motion to consolidate the hearing of appellees' certificate application with a

later hearing on appellant's application for certification of a wholly different project; and the asserted failure of the commission to make findings of fact. These are rulings typically of a judicial nature. There is nothing legislative about them. In California the Public Utilities Commission is not exclusively a legislative body. Its functions are in substantial part judicial in nature. [*Southern Pacific Co. v. Railroad Com.*, 194 Cal. 734, 738, 231 Pac. 28, 29 (holding award of reparation for excessive rates to have been judicial in nature); *City of San Jose v. Railroad Com.*, 175 Cal. 284, 290, 165 Pac. 967, 969; *People v. Lang Transp. Co.*, 217 Cal. 166, 170, 17 P. 2d 721; *People v. Western Air Lines*, 42 Cal. 2d 621, 630, 268 P. 2d 723.]

The instant case is unlike *Atchison etc. Ry. Co. v. Public Utilities Commission, supra*, 346 U. S. 346, and the decisions upon which it relied. There what was drawn in question was the validity of the commission's final and definitive order—the order that conclusively determined the rights of the parties—not just an incidental and collateral procedural ruling. Our case is more nearly like *Alabama & Vicksburg Ry. Co. v. Journey*, 257 U. S. 111, in which a writ of error was dismissed, the violation of federal law there claimed not being in the judgment under review but in an intermediate ruling sustaining a demurrer to a plea in abatement.

Our case is also like those cases in which there was drawn in question not the validity of an underlying statute but only the manner and method of an exercise of authority under it, and in which, therefore, review was held to be available if at all only by certiorari. [*Wilson v. Cook, supra*, 327 U. S. at 480; *Hanson v.*

*Denckla*, 357 U. S. 235, 244; *Jett Bros. Co. v. City of Carrollton*, 252 U. S. 1, 6.]

The legislative act here involved was the granting by the Commission of a certificate of public convenience and necessity. That was done in its first decision, of which review was not sought in the state supreme court and is not sought here. The decision of which review is sought is a supplemental one holding that compliance had been had with the conditions previously imposed on the certificate. That circumstance also differentiates the case at bar from those of which *Atchison etc. Ry. Co. v. Public Utilities Commission*, *supra*, 340 U. S. 346 is an exemplar.

The cases cited by respondent at page 7 of its jurisdictional statement as sustaining the jurisdiction of this Court do not do so. They are distinguishable in material respects. In none of them was there involved an incidental and collateral procedural order as distinguished from the definitive order of a legislative character and which was the order whose repugnancy to federal law was drawn in question. Thus, in *Truax v. Corrigan*, 257 U. S. 312, no question of jurisdiction was raised or discussed. The question there was whether this Court could go behind the findings of a state court to determine whether it had erroneously denied a claimed federal right. The claim of federal right was seasonably made below and passed on by the state court and it was that precise claim that was drawn in question here. Similarly, in *Southern R. Co. v. Virginia*, 290 U. S. 190, no question of jurisdiction was raised or discussed. The validity of the definitive order of the commission had there been drawn in question on federal grounds in the state court; and it was that same question that was

presented here. The appeal in *Napa Valley Elec. Co. v. Railroad Commission*, 251 U. S. 366, was not from a state court but from a United States District Court. The question, both below and here, was whether the denial by the state supreme court of a petition to review a rate order was *res judicata* of a suit in the federal court to set the order aside as repugnant to the federal constitution. No question of jurisdiction was raised or discussed.

The only one of the cases cited by appellant in which jurisdiction was discussed is *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282. There the validity of an act of the Kentucky legislature was specifically and expressly drawn in question in the state court; and it was that same issue that was presented here.

Surely, when this Court was given control of its docket by the legislation that severely limited the class and number of cases that could be brought here by direct appeal [Act of Feb. 13, 1925, 43 Stat. 936] it was not intended that this limitation should be purely formal and largely meaningless. The great purpose that this legislation was designed to serve [see, *Ex parte Republic of Peru*, 318 U. S. 578, 585(n.4)] can be frustrated in large measure if every procedural and intermediate ruling of a regulatory commission or board is treated as a legislative act, whose validity under federal law is drawn in question simply because the validity under federal law of the final or definitive order or judgment is challenged.[12]

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[12] A forceful exposition of the strong reasons in policy against any such expansion of this Court's appellate jurisdiction is found in the dissenting opinion of Mr. Justice Brandeis in *Dahnke-*

## IV.

### There Is No Properly Presented Federal Question in This Cause Because the Jurisdictional Statement Does Not Comply With Rule 15(d).

In a jurisdictional statement prepared conformably to the requirements of Rule 15(d) of this Court's rules, the answers to the following questions should be readily found: (1) At what stage of the proceedings in the tribunal of first instance were the federal questions sought to be reviewed raised? (2) In what manner or by what method were they raised? (3) In what way were they passed upon by the court below? (4) Where specifically in the record does the matter appear that is relied upon to support the assertion that the rulings of the court below were such as to bring the case within the jurisdiction of this Court?

The answers to those questions are not to be found in the jurisdictional statement filed in the case at bar. The Statement shows only that one of the four questions stated by appellant [*Statement As To Jurisdiction*, pp. 8-9] was raised—and that one but slantingly—in its petition for rehearing before the Commission.[13] [*Statement As To Jurisdiction*, p. 16.] It does not show when before that time, if at all, or how, even that question was raised. There is nothing to show when or how the other questions were raised before the Commission.

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*Walker Milling Co. v. Bondurant, supra*, 257 U. S. at 298-299. It is, we respectfully suggest, an exposition to which heed should be given today.

[13] What was raised was not the question whether denial of a comparative hearing was an infringement of any constitutional right of appellant, but whether decision of the pending certificate application before completion of hearings on the Pemex application would be a prejudgment of the latter.

Similarly, the Statement does not show that any of the questions were presented to or passed upon by the state Supreme Court.[14]

So, too, there are no references to the record where appears the matter relied upon to support the assertion that the rulings of the court below were such as to bring the case within the jurisdiction of this Court. The only ruling made by the court below was to deny the petition for a writ of review. This it did without opinion.[15]

This failure to comply with Rule 15(d) [formerly rule 12, para. 1] is sufficient by itself to justify dismissal of the appeal. [*Twisp Mining etc. Co. v. Chelan Min. Co.*, 320 U. S. 705; *Genz v. Washington*, 332 U. S. 748; *City Bus Co. v. Mississippi*, 299 U. S. 520.]

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[14]All that the statement shows is that in the petition for a writ of review there was complaint that certain findings were ambiguous, not that findings had not been made or that due process was denied appellant by the failure to make them; and that appellant had been denied due process by an alleged prejudgment of its Pemex application. [*Statement as to Jurisdiction*, p. 18.]

[15]The judgment of the state Supreme Court having been without opinion, it cannot be told whether any federal question was necessarily, or at all decided. Indeed, since there were independent state grounds upon which decision could have rested, and nothing to the contrary affirmatively appears, it must be assumed that decision was rested on those grounds rather than on determination of any federal question. [See cases cited, p. 24, *supra*.]

## Conclusion.

The motion to dismiss the appeal should be granted and the appeal dismissed.

Respectfully submitted.

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